Supreme Court of the United States

OCTOBER TERM, 1930

THE TEXAS COMPANY

Libelant-Petitioner,

against

HOGARTH SHIPPING COMPANY, LTD., owner of the Steamship *Mary Byron Ogilvy*, and HUGH HOGARTH & SONS,

Respondents.

MEMORANDUM AND BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN M. WOOLSEY,
HARRISON SHELDRICK,
Counsel.

R. L. Polk Printing Co., 343 Lafayette Street, New York.

SYNOPSIS OF POINTS.

FIRST POINT.

THIRD POINT.

FOURTH POINT.

LAST POINT.

ALPHABETICAL INDEX OF CASES CITED IN BRIEF FOR RESPONDENTS.

MISCELLANEOUS.

SUPREME COURT OF THE UNITED STATES.

THE TEXAS COMPANY,
Libelant-Petitioner,

against

HOGARTH SHIPPING COMPANY, LIMITED, owner of the British steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS,
Respondents.

October Term, 1920.
No. ....

MEMORANDUM IN BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

I. The opinion of Judge Hough, reported in 265 Fed. 375, and to be found in the Record, folios 700-714, pages 234-238, and affirmed *per curiam* without opinion, Record 253, folios 759 to 763, so fully refutes most of the points made by the petitioner in its petition that, for the convenience of the Court, it is here printed in full.

It is as follows:

HOUGH, J.:

"Reflection on this very interesting case, has led to the belief that it very fairly presents a question not peculiar to the admiralty, nor logically de-

pending for existence on a state of war,—although war presents the problem in an acute way, and one attracting more general attention than is commonly given to the events of peace.

"That question is, was the performance of the contract for the breach of which this action is brought,—prevented by the impossibility of performing it,—within the modern meaning of that phrase?

"Much discussion has been had concerning the efficacy of the certificate of the British Ambassador,—I do not now think it necessary to place judgment on any resolution of that query, and by some findings of fact will now show why,—and also reduce the case to the query of legal impossibility, by which phrase I mean an impossibility recognized by law as dissolving a contract.

"The parties executed a charter party, containing no 'restraint of princes' clause,—and (as I construe the document) no other clause or rider thereof authorized either party to invoke the line of decisions construing and enforcing that phrase.

"The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open, but the moment the ship owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the only ship that would perform that particular agreement.

"Whether there was what libellants call a 'valid requisition' by the British Crown or not, is immaterial, in the sense that the point is not controlling. If I accept the certificate of the Ambassador, of course there was,—but I avoid without decision that question, now before higher author-

ity in the Gleneden,—and hold on the evidence that the British Government took and used the *Baron Ogilvy*, at and during the very time when the respondents had agreed to devote her to libelant's service, and further that such use was *in invitum*, except in the sense that all British ship owners were, I presume, patriotically willing to have their vessels used for war-like purposes,—if and when no other man's ship was available.

"In point of fact respondents did not cause or contribute to the taking over by Government of the *Ogilvy*, probably it was no great surprise, but libelant was equally aware at and after charter date of the possibility of requisition.

"As matter of law, respondents were not bound to use effort to prevent requisition, *i.e.*, to shift the burden to some other ship owner's shoulders in the interest of either themselves or libelants; and it was entirely within their right to seek (when governmental use was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more.

"Finally, libelants were under no legal obligation to substitute another vessel for the *Ogilvy*, any more than they were bound to make a new charter with libelants. Legally the two propositions are identical.

"Thus the question for decision comes to this,—if the means and the only means whereby an American contract can be performed, is taken away by a foreign government, so that performance becomes physically impossible, is the contract dissolved,—so that losses or damages resulting from non-performance lie where they fell in the first instance.

"This is a large query,—but some of the elements stated are still immaterial or irrelevant. The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libelant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool, &c., Co.* v. *Phenix,* 129 U. S. 397, nor *The Ada,* 250 F. R. 400, *decided* more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.

"That is a very different thing from destroying (in a very real sense) the subject matter of agreement. If it be true as I believe it to be, that for the purposes of this suit, the *Ogilvy* was or became non-existent, then the governmental element becomes as unimportant as the foreign, also the absence of the 'restraint' clause, and the question is really reduced to its lowest terms, viz.: whether the facts present a case of that 'impossibility of performance' which is and long has been a recognized and growing reason for dissolving a contract.

"That 'ordinarily' impossibility is no defence has been said often enough. It was a common law rule, and is consonant with the often referred to 'unmorality' of our immemorial custom. For lawyers' purposes it practically rests on *Paradine* v. *Jayne,* Aleyn 26,—for a modern application in *Rowe* v. *Peabody,* 207 Mass. 226.

But the defence is equitable, at least in a broad sense, and as equitable defences have made their way at law, so the doctrine of impossibility has advanced.

"Wars, and the demands and destructions of war, do not change the law in one sense, but in another they do, by multiplying and enforcing circumstances showing the need of change,—of modernization.

"Without war, there had come to be recognized (inter alia) two well known grounds of dissolution by impossibility,—destruction of subject matter without any one's fault, and failure of contemplated means of performance. Under these heads the Great War has only furnished innumerable instances and applications. I think this litigation is one of them.

"For tracing through multiplied decisions, and attempting to recognize and display the dominant lines of argument, I have no time,—nor is that sort of thing useful in a court of first instance.

"Respondents brief consists frankly in Mr. Mackinnon's pamphlet 'Effect of War on Contract'; with its reasoning I agree,—though (as above indicated) it seems to me more philosophical to regard the matter as a growth of equity,—humanizing the common law.

"In admiralty we may recognize and enforce equitable principles without the strain that is often amusingly evident on the law side.

"The matter is one that has attracted comment for years in legal periodicals; reference to the volumes of The Harvard Law Review below noted* will give a key to the modern American cases.

* Vols. 14, p. 464; 15, pp. 63 & 418; 19, p. 462, and 12, p. 501.

"Of destruction of subject matter *Martin Emmerich & Co.* v. *Siegel*, 237 Ill. 610, is a good example, and of failure of contemplated means *Clarksville &c. Co.* v. *Harriman*, 68 N. H. 374.

"The phrase 'frustration of venture' has obtained much vogue of late, and *The Allan Wilde* (U. S. S. C., Jan. 13, 1918) will increase it. To me it seems only an equivalent for and no improvement on, 'impossibility of performance', using impossibility in the practical sense so well illustrated by Maule, J., when he pointed out that a shilling *might* be retrieved from deep water, yet legally it was 'impossible' to do it,—because no sensible man would attempt the foolish job.

"Libel dismissed with costs."

II. It will be seen from this opinion that the Court *did not* place its decision as to the fact of the requisition on the Embassy certificate.

Judge Hough specifically says that he avoids decision of that question because the same question was before this Court in the case of the *Gleneden* and that he holds, *on the oral evidence* taken by commission, that the British Government took and used the *Baron Ogilvy* at and during the very time when the respondents had agreed to devote her to the libelant's services and that such use was *in invitum*.

It is difficult to understand how the petitioner can properly contend, as in effect it does, that the Court of Appeals, having affirmed Judge Hough's decision without opinion, must have proceeded on the certificate of the British Ambassador instead of following Judge Hough and deciding the case on the evidence.

As Judge Hough's decision was affirmed without opinion, the presumption is that the Court of Appeals approved his reasons as well as his result.

It is rendered almost certain that the Circuit Court of Appeals Judges did not decide this case on the certificate of the embassy, because of their decision made a few weeks previously in the case of *The Claveresk,* 264 Fed. 276, (1920), referred to at page 8 of the petition as *Earn Line Steamship Company* vs. *Sutherland Steamship Company, Ltd.,* in which it was stated that the Court did not find it necessary to rest its decision on the Ambassadorial certificate. It said, at page 280:

> "The evidence, in the ordinary sense of that word—i. e. the competent and material testimony of persons duly sworn and papers produced—is sufficient for our purposes. * * *."

The instant case in which the petition for *certiorari* is sought, does not, therefore, involve a decision as to the effect to be given an ambassadorial certificate because the Courts below did not rest their decision on any such ground.

III. This petition is, in effect, an attempt to get this Court to reconsider the question which was before it in the case of the *Allanwilde Transport Co.* v. *Vacuum Oil Co.,* 248 U. S. 377 (1919), in which this Court held, in answer to a question certified by the Circuit Court of Appeals for the Third Circuit, that a contract without any exceptions of restraint of princes was frustrated by an indefinite embargo preventing the sailing of the vessel on the expected voyage.

IV. The facts in connection with the requisition have been concurrently found by both lower Courts in favor of the respondents and both Courts have held that, on evidence quite independent of the ambassadorial certificate, the requisition was in fact an act of the British Government against the wishes of the respondents and that the steamship *Baron Ogilvy* was used by the British Government under the requisition in such a way as to prevent her performance of the charter party with the petitioner and that the shipowner did not make a voluntary freight agreement with the British Government.

V. As a result, whatever may have been *argued* in the Courts below the *actual decisions* of the Courts below do not involve any question of public importance or novelty or any question on which there is any diversity of opinion between the various Circuit Courts of Appeal.

VI. In the event that this Court should desire to go into greater detail concerning the circumstances of the case which are disclosed in the record, they are further developed in the further brief which is annexed hereto.

VII. The case was correctly decided by the lower Courts.

VIII. The petition for *certiorari* should be denied.

Respectfully submitted,
JOHN M. WOOLSEY,
HARRISON LILLIBRIDGE,
Counsel for Respondents.

New York, October, 1920.

SUPREME COURT OF THE UNITED STATES.

THE TEXAS COMPANY, Libelant-Petitioner, *against* HOGARTH SHIPPING COMPANY, LTD., owner of the Steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS, Respondents.	October Term, 1920 No.

FURTHER BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

This case comes before this Court on an appeal from a decision and decree by Hon. C. M. Hough, dismissing the libel on the merits, with costs. 265 Fed. 375. 715-720.*

A. *The Pleadings.*

The libel, filed September 22, 1915, asked damages in the sum of $50,000, for an alleged breach of a voyage

*Unless otherwise stated all references are to folios of the record.

charter party made at New York City on or about February 6, 1915, between The Texas Company, hereinafter referred to as the libelant, or appellant and the Hogarth Shipping Company, Ltd., hereafter referred to as the respondent, whereby the libelant agreed to charter a steamship, which was to be declared on or before March 15, 1915, for a voyage from Port Arthur, Texas, to South African ports, with a cargo of petroleum in cases, steamer to load April 15 to May 15, 1915. *Libel*, 4-6. *Charter Party*, 449-453, 456-457.

The libel alleges that the steamship *Baron Ogilvy* was named by the respondents on or about March 11, 1915, for the performance of the charter party and claims that the respondent's subsequent failure and refusal to send the steamship or any steamship to Port Arthur for performance of the charter party entitles the libelant to the damages claimed. *Libel*, 7-9.

The answer of the Hogarth Shipping Company, Ltd., admits that the *Baron Ogilvy* was named for the performance of the charter party on or about March 11, 1915, and alleges that she was accepted by the charterer as the steamship by which the charter was to be performed, *Answer*, 18; admits that the vessel did not perform the charter party and sets up as an excuse that on April 10, 1915, whilst the *Baron Ogilvy* was in London she was requisitioned by the British Government for Government purposes and that thereby the charter party became impossible of performance, both in law and fact, and the respondents were excused from performing it. *Answer*, 18-19, 29-32.

The answer also sets up that the provisions of a *special voyage charter clause*, putting the movements of the vessel under the orders of the British Government and providing for certain clauses to be included in all bills of lading, was a further defense to any claim for nonperformance of the charter. *Answer*, 22-31.

The charter party did not contain the usual "restraint of princes" exemption and the defense, therefore, comes to this—

First: That the charter was frustrated by the Governmental act of the British Government, because that act as effectively destroyed the subject matter of the charter party, namely, the steamship *Baron Ogilvy*, as if she had been stranded, sunk or burned without the owner's fault.

Second: That the special voyage charter clause was the equivalent in effect of the usual restraint of princes clause.

The answer of Hugh Hogarth and Sons, filed January 17, 1916, admits that Hugh Hogarth and Sons are a co-partnership, but denies that they were the owners of the steamship *Baron Ogilvy*. *Answer*, 50.

The same separate defenses are set up as in the answer of the Hogarth Shipping Company, Limited. *Answer*, 51-68.

Apparently all claim against the co-partnership has been waived. *Statement of Libelant's Counsel*, 88.

B. *The Facts.*

The charter party was entered into at New York on February 6, 1915, and provided for the naming of a first class vessel, Class 100A1 at British Lloyds, on or before March 15, 1915. *Libel,* 6.

On or about March 11, 1915, the steamship *Baron Ogilvy* was named by Messrs. Hugh Hogarth and Sons to fulfil the charter party. *Hogarth,* 138.

In the last part of March the *Baron Ogilvy,* in performance of a prior voyage, arrived at London. Her owners sent the Master a copy of the charter party and instructed him, in case of inquiry by Government officials, to state that the vessel was already committed under the charter party to The Texas Company. *Hogarth,* 142.

On April 10th, while the *Baron Ogilvy* was still in London, the owners received the following telegram:

> "Hogarth, Glasgow,
> S. S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service. Transports." *Hogarth,* 159.

This telegram was sent by Mr. Ernest Julian Foley, Assistant Director (Military) to His Majesty's Director of Transports of the British Admiralty. *Foley,* 244.

Notice that the *Baron Ogilvy* had been requisitioned and would be unable to enter upon or perform the charter party, was immediately sent to the New York representatives of The Texas Company. *Record,* 101.

The vessel was at once taken over by the British Government, and remained continuously in the service of the Government until October 20, 1915, making several trips from New Orleans, Louisiana, to Avonmouth, England, with mules. *Hogarth*, 162-3; *Foley*, 249; *Thompson*, 413-419. *Embassy Certificate*, 130.

C. *The Decision.*

Judge Hough held that after the *Baron Ogilvy* had been named "the charter became an ordinary voyage charter for that vessel and none other," 703; that there was in fact a requisition of the vessel by the British Government, 704; that it was not necessary to have recourse to the Ambassador's certificate for the proof of this because on the evidence the requisition was independently proved, 704; that the owner did not cause or contribute to the Government's taking the *Baron Ogilvy*, 705; and that after the Government took her the "respondents were under no legal obligation to substitute another vessel for the *Ogilvy* any more than they were bound to make a new charter with the libelants. Legally the two propositions are identical," 706.

Judge Hough, therefore, found that the owner was excused from the performance of the charter party by a supervening impossibility of performance, which amounted in effect to the destruction of the subject matter, i. e., the *Baron Ogilvy*, stating that he preferred the phrase "impossibility of performance" to the phrase "frustration of venture" as a description of what had happened to discharge the parties from liability. 708-713.

In pursuance of this opinion, a decree was entered on February 21, 1919, dismissing the libel with costs.

This decision was affirmed without opinion by the Circuit Court of Appeals for the Second Circuit. 759-763.

The decisions of the Courts below were correct and the petitioner's contentions are invalid for the following reasons:

I. On the requisition of the steamship Baron Ogilvy the contract of charter party was frustrated and all rights and obligations of the parties thereunder were terminated.

(1) *When the steamship Baron Ogilvy was named on March 11, 1915, to perform the charter party the contract became one relating to that particular vessel alone, as if she had been originally named therein.*

All other terms of the contract were agreed upon. This is apparent from the charter party. *Libelant's Exhibit No. 2*, 448-474.

It was so found by Judge Hough in his opinion below. He said, 703:

> "The charter named no special ship as the subject of hire for the voyage agreed upon; that was the only matter therein left open."

Upon the naming of the *Baron Ogilvy* there was a meeting of minds on the only outstanding point of uncertainty.

The *Baron Ogilvy* was duly named on March 11, 1915, to perform the charter. *Hogarth,* fol. 138.

Far from disputing this fact, the libelant has made a sworn statement to that effect. *Libel,* fol. 7.

There is nothing in the pleadings or evidence to show that any objection was ever made by the libelant to the vessel.

The rights and obligations of the parties after March 11, 1915, therefore, related only to the *Baron Ogilvy* and the charter party became one for the service of the steamship *Baron Ogilvy.*

The owner would not have had a right thereafter to substitute another vessel for her.

As Judge Hough said, 703:

> "* * * but the moment the ship-owners named the *Baron Ogilvy* as the vessel to perform that agreement, the charter became an ordinary voyage charter for that vessel and none other. She was for all legal purposes the ship and the only ship that would perform that particular agreement."

In *Stoomvart Maatschappy Nederlandsche Lloyd* v. *Lind,* 170 Fed. 918 (1909), a coal charter party gave charterer the option of three loading ports. He exercised the option by naming one, but finding no cargo there, sought to have the vessel sent to another loading port. To accomplish this purpose he made several offers to the owner, but they were not accepted. The vessel remained in the original port, where she eventually loaded.

In an action for demurrage by the owners, this Court reversed the decision below and granted the demurrage claimed for the entire period of the detention, on the ground that upon the naming of the port of loading the

charter became *an agreement to carry coal from that port only* and consequently that there was not any obligation on the owners to go to any other port to load. In the course of the opinion Judge Ward said at page 919ff. (Italics ours):

> "* * * Accordingly, August 9th, the charterer, after communicating with Washington, ordered the steamer to go to Baltimore for her cargo. This they had no right to do, because the charter had become, *by virtue of their ordering her to Newport News, an agreement to carry from Newport News to Honolulu.* * * * It is, however, equally true that one party cannot compel the other affirmatively to do something which the contract does not require of him. Men generally being reasonable, such departures from agreements are usually accomplished amicably. Whether the ship owner in this case was reasonable or not in its refusal to shift to Norfolk, except upon its own terms, it had a right to refuse, because there was nothing in the charter compelling it to shift."

It is submitted that there is not any distinction in this respect between an option to name a loading port and an option to name a vessel and that, therefore, the case just cited is a precise authority for Judge Hough's decision on this branch of the instant case.

(2) *The requisition was established by oral evidence taken under an open commission in England.*

Ernest Julian Foley was Assistant Director (Military) to His Majesty's Director of Transports at the time of the requisition of the *Baron Ogilvy*. *Foley*, 235.

The Director of Transports was the head of the department of the British Admiralty, which dealt with all matters of sea transport and requisition under the direction of the Lords Commissioners of the Admiralty, a branch of the executive government exercising the powers of the Crown in respect of naval matters. *Foley*, 235-237.

In accordance with the general practice, Mr. Foley sent a telegram dated April 10, 1915, and reading as follows, 244:

> "8/48 O H M S Admiralty, London.
> Hogarth, Glasgow. SS *Baron Ogilvy* is requisitioned under Royal Proclamation for Government Service.
>
> TRANSPORTS."

In requisitioning vessels Mr. Foley was acting in behalf of the Lords Commissioners of the Admiralty. *Foley*, 259-260.

The requisition of the *Baron Ogilvy* was made pursuant to a request from the Military Department, for vessels to transport mules, *Foley*, 253-254, and the vessel was used for this purpose. *Foley*, 249; *Thompson*, 413-419.

If the requisition had not been complied with the vessel would have been taken by force. *Foley*, 245-246, 272.

Mr. Hogarth, the senior member of the firm of Hugh Hogarth and Sons, *Hogarth*, 135, testified that on April 10, 1915, he received a telegram from the Admiralty, requisitioning the *Baron Ogilvy*. *Hogarth*, 158-159.

He had had previous experience of the course pursued by the Government in requisitioning vessels, *Ho-*

garth, 160, for six of the twelve vessels of the Hogarth Steamship Company, Limited, of which his firm was manager, had been requisitioned. *Hogarth*, 140. The requisition of the *Baron Ogilvy* was the usual form. *Hogarth*, 160.

The telegram was considered as a formal requisition of the steamer, *Hogarth*, 173, and was confirmed in the subsequent dealings of the parties in respect of the arrangement for the carriage of mules. *Hogarth*, 173.

That it was not confirmed immediately by a letter of requisition was an error in office routine, due to pressure of work of the Admiralty. The failure to send the letter, however, would not have prevented seizure of the ship for non-compliance with the order contained in the telegram. *Foley*, 245-246, 274.

The failure to send a formal letter of requisition did not, in the opinion of Charles Robertson Dunlop, who qualified as an expert in respect of the prerogatives and powers of the English Crown, 578-579, affect the validity of the requisition under English law. 221, 294-295, 297-299, 300-301, 309-314.

In the case of the *Earn Line Steamship Co.* v. *Sutherland Steamship Co., Ltd.*, the Court, speaking by Judge Hough, dealt with similar facts, as follows:

> "The second proposition (that the order was *ultra vires*,—meaning that it was not in accord with English municipal or constitutional law) is equally without support, even though we disregard the multiplied decisions, including our own, regarding the efficacy of the ambassadorial certifi-

> cate. It is here proven without any reference to that document, that the act commonly called 'requisition' was governmental, and contained or expressed in a letter or order over the signature of the Secretary of the Admiralty. Further, that such letter or order was in assumed compliance with a proclamation dated 3d August, 1914, and an Order in Council dated 10th November, 1915. Whether in exercising this power the officers sending the telegram, signing letters and issuing orders were acting in strict accord with the municipal and constitutional law of the United Kingdom, is a question with which we cannot be concerned; for there is plainly proven a governmental act done within British territory, and we entirely agree with the court below that it is settled law that the act of another sovereign within its own territory is for our purposes legal of necessity. (*Hewitt* v. *Speyer*, 250 F. R. at 370, and cases cited.) The requisition of the *Claveresk* was a restraint of princes, lawful so far as we are concerned to inquire; * * *."

So here the requisition was proved as found by the Court below as a governmental act by ordinary evidence given in England entirely independently of the Embassy certificate.

(3) *The fact of the requisition as a governmental act of Great Britain was avowed by the British Embassy.*

The British Embassy certified under its official seal, as follows, 130, 131:

> "IT IS HEREBY CERTIFIED that the British steamship *Baron Ogilvy* on April 10th, 1915, while lying

in the port of London, England, was requisitioned by the Government of the Kingdom of Great Britain and Ireland for Government service under the prerogative of the British Crown; that the period of said requisition was indefinite, and that after it became operative as aforesaid, the steamship *Baron Ogilvy* was continuously in the service of the British Government and was operated solely under the orders and direction of the British Admiralty until October 20th, 1915; that said steamship was of British registry and belonged to a corporation created and existing under the laws of Great Britain and Ireland, and that the requisition of said steamship was a Governmental act by the Government of Great Britain and Ireland."

The British Embassy's counsel appeared as *amici curiae*, offered, and with leave of the court filed a Suggestion which embodies the certificate and further submits that neither the fact of the requisition nor its effects should be inquired into by this court and that the court should decline to adjudicate the cause, upon the grounds that it involves the relations between the British Government and the owner of a British steamship, calls for a determination by a United States Court of the effect of Governmental acts of the British Government and involves an attempt to hold the respondent liable for acts of its Government. 124-129.

(4) *No act of the owner or its representatives and no failure to act on their part in any way caused or contributed to the requisition.*

There is not any evidence that the owner preferred to have its vessel requisitioned rather than to carry out

the charter party. On the contrary the evidence clearly shows that the owner desired to perform and was prevented from performing solely by the requisition which rendered performance impossible.

The Hogarth Shipping Company was endeavoring to keep its unrequisitioned ships away from England, in order, if possible, to avoid further requisitions. *Hogarth,* 180.

The *Baron Ogilvy,* however, was compelled to come to London, in order to discharge cargo. *Thompson,* 400, 401, 432.

There was nothing left undone that could have been done to keep the vessel off requisition. *Hogarth,* 165. It simply could not be avoided for the Government wanted prompt ships. *Foley,* 243, 246-249.

The appellant argues, in effect, that the mule rates under the requisition were so attractive that the appellee made a voluntary arrangement with the British Government to carry mules in total disregard of its contract obligations to the appellant.

This is not the fact.

It is the fact that no arrangement for carriage of mules was made with the government until *after* the requisition had occurred.

It was obviously to the owner's interest to perform the charter with appellant and then to proceed from South Africa to Pagoumene, New Caledonia for a cargo of ore homeward on his private account. 496.

Mr. Hogarth states that he wished to carry out the charter with the Texas Company rather than to have the vessel requisitioned, for the profit under the charter would have been much greater than the profit under requisition.

In regard to this he testified on direct examination, as follows, 165:

> "Q. How would your profits under that charter have compared with the profits that you actually made if you made any while the vessel was under requisition to the Admiralty? A. The profits under the oil charter would be infinitely more than the profits under the requisition."

The loss is shown more in detail on re-direct examination (Italics ours). 211:

> "Q. At the rate you were being paid per for mules by the Admiralty, what did you make per month? A. *A little more than we should have got at the 11s. Blue Book Rate, probably £600 or £700 per month.*
>
> "Q. *As compared with £1,500 to £2,000?* A. Yes, carrying oil the steamer would have loaded 180,000 cases at 2s. per case and, roughly, that is £18,000, *she would have left about £7,000 profit on the oil voyage.*
>
> "Q. And in three months of Admiralty requisition on the terms on which you were what was the profit? A. I can speak more accurately on Blue Book Rates, and this we considered a little better. On Blue Book Rates she would have made £500 a month, but we took a lot of responsibility and trouble in providing muleteers and quarters and we got £100 more.
>
> "Q. *Did you make a considerable loss by having the vessel requisitioned?* A. *A very great loss.*
>
> "Q. It is suggested you refrained from taking measures to get the *Baron Ogilvy* free because it was to your interest in some other way, to have

her requisitioned. Is there a word of truth that your personal interest or the interest of your company came into the matter at all? A. No."

The fact that the owners would have had to cover war risks under the charter, whereas the Government bore the war risk under the requisition, was allowed for in the testimony above quoted. *Hogarth,* 213-214.

The libelant in his brief has attempted to refute this evidence by Mr. Hogarth that the carriage of mules under the requisition represented a loss to him as compared with what would have been earned by the carriage of oil under the charter which is the subject matter of this suit.

The difficulty with the appellant's position in this regard is that it is attempting to attack direct evidence by figuring on estimates of its own.

There is not anywhere in the evidence any statement as to the expense for putting in the mule fittings, for attendance on the mules, fodder, electric-light, wireless telegraphy installation, etc. In other words, the libelant has attempted to create a comparison in which there are a number of unknown elements on both sides. For example, it is not known to how many ports the steamship *Baron Ogilvy* would have been ordered by the Texas Company in the event that she had carried the case oil.

It was provided in the charter that the *Baron Ogilvy* was to have half a cent extra per case on the whole cargo for each additional port and an option was given to discharge it at from one to five ports.

It is not known how many mules died on the voyages of the *Baron Ogilvy* thus causing loss of the gratuity given for mules landed alive.

There is not any definite proof as to what the expenses under the Texas Company charter would have been, nor what the expenses under the Government requisition were.

If, therefore, the gross monthly freight earnable under the Texas Company charter be represented by the letter A, and the expenses under that charter by the letter X, and the gross monthly earnings for the carriage of mules for the Government be indicated by the letter B and the expenses by the letter Y, it follows that, inasmuch as we do not know what the expenses X or the expenses Y amounted to from any evidence which is in the record, the relation between A minus X and B minus Y cannot be known.

Of course, it had already been decided in the Circuit Court of Appeals for the Second Circuit that the fact that a charterer may earn more out of a requisition than he was earning under a charter party is not material on the question of frustration. *The Claveresk*, 264 Fed. 276, (1920).

The purpose of the appellant's argument in the present case in respect of the alleged earnings by the carriage of mules for the Government as compared with the earnings under the Texas Company charter is obviously made as a background for a claim that the requisition was secured by connivance of the owner for its own benefit.

This is clearly shown by the proof, documentary and otherwise, not to have been the fact.

As this claim of connivance has been stressed by the appellant it is necessary to go into the correspondence in some detail to illustrate the soundness of the appellee's position in this regard.

The good faith of the owner of the *Baron Ogilvy* is illustrated by its letter of the 25th of March, 1915 to the Captain. 482-486. In it the owner says, 483-485:

> "We have, of course, been greatly disappointed at your being ordered to London as we should have much preferred your going to the Southern French ports and getting out of the submarine area as well as avoiding the very great risk of being requisitioned for Admiralty service. We are very much afraid of this latter, as at present the Admiralty are urgently in need of vessels of your type for their Mediterranean expedition.
>
> You are declared under an open charter for a cargo of Oil from Port Arthur, Texas, to the Cape ports. The copy of the charter is enclosed herewith, and if you are visited by any Government Officials you can inform them that the vessel is chartered from the States to the Cape and if necessary exhibit the charter party."

The Captain acknowledges receipt of this letter and the charter party under date of March 28th. 488.

On March 30th, the owner replied to the Captain's letter of March 28th, which dealt with various details of his previous voyage and indicated to him again its intention to carry out its South African voyage for the Texas Company, saying, 496:

> "Our present intentions are to send you from the Cape Ports to Australia for bunkers and load

> home under contract from Pagoumene (New Caledonia) to Glasgow."

Captain Thompson confirms the orders that had been given him by the owner as to the voyage for the Texas Company. 403-404. He also testified that he made up his store list for a voyage from Port Arthur where he was to load for the Texas Company. This list, he says would have been different from the store list out of New Orleans. 437-438.

Under date of March 31st, the owner received a telegram from Messrs. Harley & Company confirming their fears that the vessel might be requisitioned, reading, 498:

> "Admiralty Note *Baron Ogilvy* in London may require requisition her. Please post plan. Say when expect discharged."

The owner wrote to Messrs. Harley & Company under date of March 31st, as follows, 499-500:

> "We have your telegram of date from which we take it that the Admiralty have apparently been questioning you regarding this vessel. Please point out to the Admiralty that we have already with the *Baron Jedburgh*, eight vessels on Government service, a larger proportion of our tonnage than we are entitled to give, and that besides, this steamer is chartered for a cargo of oil from the States to the Cape Ports and thereafter from New Caledonia to the U. K. Continent. We cannot say when she is likely to be discharged."

On the 1st of April, 1915, the owner received a letter from a firm called Hogg & Robinson, asking for a ready

vessel capable of carrying 4000 to 6000 tons, measurement, of hay, which it was stated the Director of Transports wished for Government service. 501-502.

Under date of April 1st, the owner also got a letter from Messrs. Harley & Company in which the owner's letter to Messrs. Harley & Company of the 31st of March was acknowledged, and in which Harley & Company pointed out that the fact that the steamer was already chartered from the States to the Cape and thence from New Caledonia to the United Kingdom would not be of any concern to the Admiralty if the country needed the steamer. 505-506.

Under date of April 2nd, Hogarth replied to the letter of April 1st from Hogg & Robinson and suggested that Hogg & Robinson should call the attention of the Director of Transports to the number of vessels which had been requisitioned from the Hogarth fleet and to important contracts which they already had for the carriage of copper ore. 507-508.

Under date of April 2nd, Hogarth wrote to Messrs. Harley & Company advising them that Hogg & Robinson had been asking information for handy tonnage for the carriage of hay and that they had suggested to Hogg & Robinson that they should call the Director of Transports' attention to the heavy commitments which Messrs. Hogarth had for any handy vessels. 510-511.

Under date of April 3rd, Hogg & Robinson acknowledged Messrs. Hogarth's letter of April 2nd and further urged the Government's requirement for prompt vessels for the carriage of 4000 to 6000 tons of hay. 513.

Under date of April 6th, Hogarth replied to Hogg & Robinson's letter of April 3rd and advised them that it

had not any vessels in England, or shortly due there, with the exception of the *Baron Ogilvy* which was then in Milwall Dock, and they added, 515:

> "This vessel is, however, chartered to load in the States."

Messrs. Hogg & Robinson replied under date of April 7th that the *Baron Ogilvy* was suitable for the hay requirement, and desired to be kept posted as to her movements, adding that they understood from the Milwall Dock Authorities that she would possibly be clear, that is her cargo would be discharged, by Wednesday following. 518.

On the 9th of April Hogarth received two telegrams from Harley & Company.

The first which was sent at 1.13 p. m. and received in Glasgow at 1.54 p. m., read, 525:

> "*Baron Ogilvy.* We regret to inform you Admiralty say must requisition this steamer for Country's need. Telegram of Requisition is being prepared and you will receive same later."

The second telegram was sent from London at 1.45 p. m. and received at Glasgow at 2.16 p. m., reading as follows, 520:

> "*Baron Ogilvy.* Referring to Admiralty Notice Requisition We believe could induce them take her instead for three or four trips New Orleans, Avonmouth or Liverpool, Fourteen pounds namely Thirteen pounds ten and ten shillings gratuity. Shall we try to do so."

On April 9th, Messrs. Hogarth & Company acknowledged these two telegrams from Messrs. Harley & Company and, 527, confirmed the telegram they sent in reply to the two telegrams from Messrs. Harley & Company. They wrote as follows (Italics ours):

> "We have intimated to Hogg & Robinson that the vessel is committed for further business but probably the requisitioning arrangement which you refer to will be that of another department and *it will be as well to make them clear, that the vessel is fixed for oil from the States to the Cape and thereafter from New Caledonia home. Meantime, of course, we have not received a requisitioning telegram and cannot move in the matter.*"

Certainly this was a perfectly justifiable position and showed perfect good faith on the part of the owner Hogarth.

On April 9th Messrs. Harley & Company also wrote three letters to Messrs. Hogarth.

In the first of these, 529-531, they stated that they were sorry to advise Messrs. Hogarth that the Admiralty had informed them that the *Baron Ogilvy* was required for the needs of the country and that a formal telegram of requisition was being prepared which would be received in due course. They expressed regret that the Admiralty had to take the steamer and a belief that the Government would not disturb any steamer's commitments if they could avoid it.

In the second letter they referred again to the notice of requisition by the Admiralty of the *Baron Ogilvy* and

said that they believed it would suit the Admiralty's purpose just as well if they were to charter her from New Orleans to Avonmouth or Liverpool for mules at Thirteen pounds ten shillings and ten shillings gratuity for three or four trips, and also stated that they believed if they were authorized to approach the Admiralty they could arrange this use of the vessel, 522-523.

A third letter of April 9th Messrs. Harley & Company, 536-537, acknowledged Hogarth's telegram dealing with the Hogg & Robinson situation and replying to the two telegrams of April 9th received from Harley & Co.

In this letter Messrs. Harley & Company said that they did not know why Messrs. Hogg & Robinson were troubling Messrs. Hogarth, that the department of the Admiralty which Hogg & Robinson followed was quite distinct from the department which Messrs. Harley & Company were following, and added that they understood that the requisitioning of the steamer *Baron Ogilvy* was absolute. They enclosed a copy of the requisition terms. They also stated that they had pointed out to the Admiralty earlier in the day that the steamer was under commitment for other employment, that the Admiralty replied that they could not help that as they required the boat and that any claims that might subsequently come forward would have to be met in the usual manner. 536-537.

On the 9th of April Messrs. Harley & Company wrote, without any authority from Hogarth, a letter to the Director of Transports referring to his verbal notice of requisition and suggesting that possibly the vessel could be chartered for the conveyance of mules on the same terms as the other *Baron* steamers which were operated in that trade. 532-534.

On April 10th a telegram of requisition was sent from the Admiralty at 8.48 a.m. to the owner, reading as follows, 538:

> "S.S. *Baron Ogilvy* is requisitioned under Royal Proclamation for Government service"
>
> "Transports"

On April 10th Messrs. Hogarth wrote Messrs. Hogg & Robinson, advising them that the vessel had been requisitioned, that she was the *ninth* vessel of their small fleet then on Government service, and hoped that the Admiralty would see fit to leave the rest of their fleet alone as they did not know of any firm of tramp shipowners with the same proportion of vessels on Government service as they had. 540-541.

Under date of the 10th of April, Messrs. Harley & Company wrote to Messrs. Hogarth & Company dealing generally with the situation and explaining how Messrs. Hogg & Robinson had been injected into it. They added, 544 (Italics ours):

> "You will now have received a formal telegram from the Admiralty requisitioning this steamer under Royal Proclamation for Government Service.
>
> "The Admiralty have also sent us a similar telegram.
>
> "As they had not sent this message off last evening when we saw them *they could not proceed to discuss the alternative suggestion that we have in hand,* but we are seeing them at noon today and will advise you further."

This clearly indicates not only that the Admiralty insisted on requisitioning the vessel first and then negotiating as to trades afterwards but also that there was not any arrangement made with regard to the carriage of mules until *after* the vessel had been taken by the Government under requisition and that then, as the District Court suggests, the owner proceeded quite properly to arrange to make as good a freight as they could out of the Government business.

This arrangement was subsequently consummated through Messrs. Harley & Company in a series of letters and telegrams. 546-560, 572-578.

The testimony of Mr. Foley, of the Admiralty, confirms the facts of the situation as it has been above outlined.

He testified, 242-243 (Italics ours):

> "Q. Before the date when the vessel was actually requisitioned had you any request from the owners or Messrs. Harley that she should not be taken?
>
> (Question objected to.)
>
> A. We had.
>
> Q. What treatment, in effect, did this question receive? A. We did as we did with everybody; we listened to what they had to say and did our best to avoid hardship, but *we needed the ships, we needed the prompt ships, we needed the suitable ships, and therefore we took them.*
>
> Q. In those circumstances was it found essential to requisition the *Baron Ogilvy?* A. Yes. This ship was particularly suitable for our services *we wanted her for the carriage of mules.*"

Again, 270-273, he testified. (Italics ours):

"Q. Was not this a case in which it was happily possible for the parties to mutually agree upon the terms of engagement? A. No, not from my point of view, the reason being that we were dealing with a very large number of ships and you probably know that negotiations to arrive at a rate to be agreed between two people are a lengthy and troublesome process; there was no possibility of doing it.

Q. You had already, in the case of other ships belonging to this same line, arrived at certain conditions upon which they were being worked? A. Quite.

Q. And in respect of this ship you were able to agree that the same conditions should apply? A. Quite.

Q. It was not, therefore, either difficult or a lengthy business to come to a mutual agreement as to the terms of engagement with regard to this particular vessel? A. *It was not a difficult or lengthy business when I had requisitioned her, but to conclude a bargain with them on the basis of a free ship would have been a difficult and lengthy business. I could not have done it; the ship had a charter she could not break.* It was impossible for myself and the owners to come to an agreement for the use of that ship. *I had to take the ship by the exercise of the Crown's powers. Quite obviously there was no question of discussing terms with the owner; he had a prior engagement for the ship.*

Q. Had you not, as a matter of fact, given some intimation to Messrs. Harley before the 10th April that you would probably be requiring this vessel? A. Yes, I think we had.

Q. Before the 9th April? A. I think so; our need was very well known; our whole purpose of getting the particulars of those ships was that we should be up to date in their position and so forth.

Q. Had you not made it plain to them that if this vessel was not chartered to you on the terms on which you were already employing the other vessels of this line, you would have to requisition her? A. *Certainly not. May I point out again there is no question of charter; the owners could not charter the ship to us. They had a charter for the ship.*"

And again, 279-283, he testified. (Italics ours):

"Q. Just to get the sequence of events, about this 9th and 10th April, it would rather appear—tell me if I am right—that on or before the 9th April you had verbally requisitioned the *Baron Ogilvy.* Would you look at the first letter to which my friend referred? A. 'With reference to your verbal notice of requisitioning this steamer.' *We told Messrs. Harley obviously that we were going to take that steamer.* The actual telegram sent on the 10th I think was at 8.18 A.M., very early, so the decision was come to on the 9th. As Harley was in constant attendance at our office, he would have been told on the 9th.

Q. Then there was an arrangement made as to the terms upon which the vessel should run for the government? A. Quite.

Q. It is referred to there as chartering her? A. Yes.

Q. You were one of the parties to that arrangement? A. Yes, I was.

Q. Was that, in your view, a voluntary charter of the vessel by the owners to the Director of

Transports? A. Not voluntary in any sense except this, that he was not bound *after the ship was requisitioned* to accept these conditions as to giving us fittings and attendants, and forage and so forth.

Q. In other words, you had a right, as you told us, by the prerogative of the Crown to requisition a ship? A. Which I exercised.

Q. But had you any right to require the owner to alter her or put up fittings? A. I had no right to do that.

Q. As I understand, for the carriage of the mules, that would have to be done by the Admiralty? A. That would have to be done by the Admiralty.

Q. And it suited you to have that done by the owners instead? A. It suited me to pay Hogarths, as my agents, to do it.

Q. Supposing you had not come to an arrangement as to the terms on which this vessel was to run on these mule trips, what could have happened; would Hogarth have had his vessel free? A. No, *I should have taken the ship, had her fitted myself, and he would have been paid the Blue Book rate of hire and nothing more, in addition to which there might have been his liability for punishment.*

Q. I dare say they have heard in the States, as we have here, of what we call in this country Hobson's choice? A. Yes.

Q. Would it be right or wrong to suggest that with regard to this ship, so far as Messrs. Hogarths were concerned, it was rather a case of Hobson's choice? A. It was entirely a case of Hobson's choice."

Mr. Hogarth also testified as to his desire to carry out the Texas Company contract. *Hogarth*, 141-142.

Judge Hough, therefore, dealt with the situation below entirely correctly when he said, 705-706:

> "As matter of law, respondents were not bound to use effort to prevent requisition, *i. e.*, to shift the burden to some other ship owners' shoulders in the interest of either themselves or libellants; and it was entirely within their right to seek (when governmental use was certain) the carriage of mules instead of something else, if mules promised less loss than other probable freight. This they did—nothing more."

It is submitted that the owners' attitude was unexceptionable throughout, and that with his ship in London —in the Lion's mouth, as it were,—a clearer case of Governmental *vis major* against them can with difficulty be imagined.

We can leave it with the remarks of Mr. Foley who knew all about the situation and who aptly said, on cross examination when questioned about the negotiations for the carriage of mules, 265-268:

> "Q. Do you still say, in the light of the language used in those three letters, and in that telegram that this vessel was not chartered to you by her owners? A. Surely the question is, what exactly you mean by chartered? *If you mean I made an agreement with the owners after the requisition, certainly, but if you mean the owners chartered to me freely in the market sense of the term chartered, but that they had a free boat that they*

offered at the market rate, and I took it, no, nothing of the sort.

Q. Is not that what happened, that you sent to the owners the telegram of the 10th April, and the owners under the pressure of that telegram offered to charter the vessel to you, and you accepted the offer? A. It is rather difficult to answer the question, you put it rather curiously, if I may say so; *I requisitioned the ship and afterwards the owners and myself agreed to a certain basis of payment; that is really the way it is in my mind.*

Q. That is your view of the transaction? A. That is my view of the transaction.

Q. You would not say that the language employed in the letters was inaccurate? A. No, because after the requisitioning telegram went a certain offer was made to us, and we accepted it, *but all this is the sequence of the requisitioning of the ship.*

Q. Is not this just one of these instances in which the shipowner has bargained with you on the basis that you had the big stick? A. No, *the point is the shipowner has his ship taken from him; then all he can do as a prudent shipowner is to make the best he can of it with us. I had something I wanted from him outside the ordinary requisition and it suited him to take that line.*

Q. The result of the arrangement was that you obtained something from him you would not have obtained if the vessel had been requisitioned in the ordinary way? A. Quite, that is so."

(5.) *After notice of requisition the owner was not under any duty to try to resist the requisition or to get the vessel released.*

The vessel was taken under an undoubted war power of a Sovereign Government. This being so, it can hardly be contended that because of private contract with a foreigner the British owners were under legal obligation actively to oppose their Sovereign in order to carry out their private contract.

In the case of *Earn Line Steamship Company* v. *Sutherland Steamship Company, Limited*, 254 Fed. 127, the question involved the requisition of a vessel under a time charter, where the profits to the owners were greater under the requisition than under the charter. In dealing with a criticism by charterers of the owners' compliance with the telegram of requisition, Judge Learned Hand, in 254 Fed. at p. 129 said:

> "Nor am I impressed with the suggestion that the formal requisition followed the original telegram only because of the respondents' compliance in its telegraphic answer. It appears to me somewhat naive to suppose under such circumstances as then existed that the British Admiralty made requisitions dependent upon the consent of the ship owner. That the respondents were eager enough to have their ship taken is clear enough, as well as is their desire to get rid of a charter then become onerous and to substitute the Admiralty hire, but that this attitude of his had any effect upon the result seems to me a thin supposition."

Upon appeal of that case, this Court, in an opinion by Judge Hough, discussed the possibility of resistance by an owner to the requisition of a vessel, and said in part, 264 Fed. 280 (Italics ours):

"Thus the question is reached whether in obeying the order, Sutherland yielded to that restraint of princes excepted in the charter party.

"It is here to be noted that the charter was not a demise. Subject to the chartered rights of Earn Line, the ship-master was the owner's master, and the ship, through that master, in the owner's possession. (*The Santona*, 152 F. R. at 518). Therefore in legal contemplation the vessel was taken or received from the owner and not from the charterer.

"On the question last stated appellant offers two propositions: (1st) The clause refers merely to physical restraint of the ship; an order to the owner is not within its meaning. (2nd) The order was "*ultra vires*";—meaning that it was not in accord with English municipal or constitutional law.

"The first proposition is untenable. In times past, when a vessel left port, she disappeared from her owner's ken; there was no means of communicating with her except by other ships like her, and electricity and steam did not keep owner and ship in constant touch. In such times force, governmental or other, was more swiftly and more usefully exerted on the ship than on the owner. Now it is more efficacious to act on the ship through the owner, and (so to speak) requisition or commandeer the owner, and through him his vessel; putting upon that owner the same necessity of obedience that in former days was exercised on the master wherever the ship might be. The theory has not changed, but the method of application has been modernized. The fundamental essential of a restraint of rulers is that the restraining act should be governmental (*Northern etc., Co.* v. *American, etc., Co.*, 195 U. S. at 467 *et seq.*). That the restraint need not be physical was in effect held in

The Styria, 186 U. S. at 18; and see cases cited in *The Athanasios*, 228 F. R. 558. The matter is fully covered by Lord Reading in *Sanday* v. *British, etc., Co.*, 2 K. B. (1915) at 802; in which case, on appeal to the House of Lords, it was said (in affirming the judgment) that "the circumstance that force was neither exerted nor present (is immaterial) for force is in reserve behind every state demand"; and it was added in substance that it would be "a strange law" which required one to resist "till the hand of power was laid upon him, an order which it was his duty to obey. If it were an order which he was not bound to obey and which he might have successfully resisted either by violence or by process of law, a question might arise * * *."

"The evidence here is plain that resistance was impossible; all that Sutherland could have done would have been to say "I refuse to order my captain to report to the Admiralty agents; I prefer to leave my ship in the service of a neutral charterer." The supposed case need not be pursued;—to the probable and proper punishment of such an act. *No citizen or subject is by lawful private contract either required to or justified in proceeding to such lengths in resisting or evading the compulsion of his government.*"

A disregard of the requisition when the vessel was in London to the extent of attempting to send the vessel to Port Arthur in defiance of the requisition would not have been beneficial to the charterer, because the vessel would have been taken in any event. *Foley*, 246.

Incidentally there can be little doubt but that the owner would also have been subject to heavy penalties

and possibly the loss of all remuneration for the use of its ship.

In *Gans Steamship Line* v. *the British Steamship Frankmere*, 262 Federal 819 (1920), a similar question came up for decision in the United States District Court for the Eastern District of Virginia. In that case the vessel was at Genoa when requisitioned. The compensation received from the Government under the requisition of a time chartered ship was greater than that which would have been received under the time charter in force at the time of the requisition. Claim was made for this excess as damages. Judge Waddill sustained the requisition as an exercise of Governmental *vis major* and held that the charter was frustrated.

Concerning the efforts made in this instance to prevent requisition or secure the vessel's release therefrom, Mr. Foley testifies as follows, 246, 249:

> "Q. I do not know whether any representation in fact was made to you by either the owners or Messrs. Harley & Company, their agents, after you had requisitioned her in the way you have stated, to have her released?
>
> (Question objected to.)
>
> "A. That is very difficult to say. I had constant interviews with Messrs. Hogarth and Messrs. Harley in which they pressed for the release of steamers. It was at that time a constant plea from all ship owners, and Messrs. Hogarth were not less persistent than others.
>
> "Q. Having regard to the nature of the employment which if the vessel had not been requi-

sitioned she was about to take up, that is to say the carrying of oil from Texas to Cape ports, would a request by the owners or Messrs. Harley & Co. for her release have resulted in her being released? A. Certainly not.

"Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interest of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance."

The argument that it was unfair of the Government to requisition more of the Hogarth steamers because they had already requisitioned such a large number, was frequently brought to the attention of the Admiralty. *Hogarth*, 188.

In the cases of the requisition of the *Baron Yarborough* and the *Baron Kelvin*, which were released from requisition, the vessels were under charter to carry pyrites, a cargo which was of prime importance to the Government. *Hogarth*, 189-190. The carriage of petroleum to South African ports by the *Baron Ogilvy* did not furnish a similarly cogent argument for her release.

In this regard Mr. Hogarth testified, 189-191:

"Q. Now, I suggest that you might have taken up this matter of the *Baron Ogilvy* much more energetically if you had been really anxious to discharge this contract. Is it your statement that

you could have done more than is represented by these few letters? A. Nothing more, in my opinion, would have had any effect. I had no argument with which to go to them. It was not the government interest to carry a cargo of oil, whereas it was very much to the government interest that we should go on carrying cargoes of pyrites to this country."

and again 210-211:

"Q. Have you had experience of endeavoring to get vessels released by the Admiralty? A. Yes.

"Q. Have you considered you had any argument worth putting forward to the Admiralty in respect of the *Baron Ogilvy* to get her released? A. No, I considered I had no argument; I could not plead it was in the national interest that a cargo of oil should be carried from the States to the Cape."

Mr. Foley testified to the same effect, *Foley*, 248:

"Q. Was the carriage of a cargo of oil from Texas to Great Britain regarded by the Transport Department as being in the interests of the British Empire at war? A. I can hardly answer that. What happened was that it was not considered anything like so requisite as the carriage of mules from the United States to this country for the purposes of war. The carriage of oil to the Cape was of importance, but it was not comparable with the carriage of mules to this country, that is to say, military importance."

(6.) *The effect of the Act of the British Government was to frustrate the charter party which is the subject matter of this suit and to discharge both parties thereto from all further obligations thereunder.*

Under the provisions of Clause 8 of the charter party, the lay days for loading were not to commence before April 15, 1915, and if the vessel was not ready to load by 2 p.m. on May 15, 1915, the charterers had the option of cancelling. 456-457.

In other words, this was a charter party for vessel's delivery in April-May, 1915, at Port Arthur and for a voyage immediately thereafter to South Africa. It is shown by the evidence that the Texas Company had commitments for the carriage of the cargo which they contemplated sending by the *Baron Ogilvy*. They subsequently lifted the cargo on the *Vimeira*, which was chartered April 14, 1915, to carry the cargo in question. 104, 445.

It is interesting to note that the *Vimeira* charter also was for loading *between April 15 and May 15, 1915*. 445.

It is an uncontroverted fact that the steamship *Baron Ogilvy* did not get out of Government service until October 20, 1915. *Embassy Certificate*, 131; *Foley*, 253.

Thus the requisition of the vessel occupied many months more than the voyage under the charter of the Texas Company would have occupied and the commercial use of the vessel during the period when the charter of the Texas Company would have been performed was rendered entirely impossible by the act of the British Government.

At the time of the requisition, therefore, the release of the vessel during the period when the Texas Company charter under ordinary course would have fallen to be

performed was not expectable. The owner took this position at once in communicating with the Texas Company and advised the Texas Company under date of April 12th of the fact that the vessel had been requisitioned and would not be able to carry out her charter. 102-103.

The intimation contained in the libelant's brief that the requisition might have been only for a few weeks is entirely misleading because the suggestion of a short requisition was involved in a letter from Hogg & Robinson regarding a requisition for service in the carriage of hay, 502, whereas what the Government really wished the vessel for was the carriage of mules, and that was the trade for which she actually was used. Prompt ships were urgently needed, the *Baron Ogilvy* was a prompt ship and the Government took her irrespective of her private commitments. *Foley*, 242-243.

The Admiralty used the *Baron Ogilvy* for trade from New Orleans to Avonmouth, which was an entirely different trade from the trade which was contemplated in the Texas Company charter namely from Port Arthur to South Africa.

A more perfect case of the frustration of a venture by *vis major* would be difficult to find.

Great emphasis is, apparently, placed by the appellant on the fact that the charter party in the present case did not contain the usual restraint of princes exemption.

But an exception has not anything whatever to do with the doctrine of frustration.

An exception may be an excuse for the temporary nonperformance of a contract which is in existence, but the

frustration of a contract means that the contract is entirely destroyed by some supervening occurrence rendering it impossible of performance.

In the present case, the contract was entirely destroyed because the requisition was the interference of a *vis major* and the period of requisition was indefinite; thereby the subject matter of the contract, *i. e.*, the use of the *Baron Ogilvy* for a voyage from Port Arthur to South Africa commencing April-May, 1915, was rendered wholly impossible. *Embassy Certificate*, 130; *Requisition Telegram*, 538.

Annexed to this brief is an appendix which contains a list of cases dealing with the frustration of charter parties and other contracts.

We shall now discuss some of these cases which seem peculiarly to apply to the situation in the present case.

The decision of the Supreme Court of the United States in the case of the *Allanwilde Transport Company* v. *Vacuum Oil Company*, 248 U. S. 377 (1919) is a flat decision supporting Judge Hough's decision in the present case.

In that case the *Allanwilde*, a sailing vessel, loaded at New York for Rochefort, France, a port in the war zone, and sailed September 11, 1917. Her charter party did not contain any exemption of restraint of princes.

On September 28th, while the vessel was at sea, unknown to the Master, a Government ruling became effective, preventing the clearance of sailing vessels bound for the war zone.

Owing to severe weather the vessel was compelled to put into New York for repairs, after which she was prevented from continuing her voyage by the Government ruling.

The Circuit Court of Appeals for the Third Circuit certified the following questions to the Supreme Court:

> "(1) Was the adventure frustrated and was the contract evidenced by the charter party and by the bill of lading issued to the oil company, dissolved so as to relieve the carrier from further obligation to carry oil?
>
> "(2) Whatever answer may be given to the first question, did the contract thus evidenced justify the carrier under the facts stated in refusing to refund the prepaid freight?"

The Supreme Court answered both questions in the affirmative.

In delivering the Court's opinion, Mr. Justice McKenna said at pages 385-6 (Italics ours):

> "It is urged, however, that there is no provision in the contract (charter party and bill of lading) of the Oil Company excepting 'restraint of princes, rulers and peoples' and that, therefore, the carrier was not relieved from its obligation by the refusal of clearance to sailing vessels. *And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed or transported in a vessel not subject to it. We cannot concur in either contention. The duration was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and*

> ***that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. The Kronprinzessin Cecilie, 244 U. S. 12."***

That the doctrine of frustration is not affected by the presence or absence of exceptions is also shown in the case of *Shipton-Anderson & Co.* v. *Harrison Brothers Co.*, 21 Com. Cas. 138 (1915).

In that case the sellers sold to the buyers by a contract dated September 2, 1914, about 42,800 centals of winter wheat ex S. S. *Dalecrest*, ex grain storage, payment cash within seven days against transfer order.

There were not any exceptions in the contract.

At the time when the contract was made the sellers were the owners of a parcel of 42,800 centals of winter wheat which had been discharged out of the steamer named and was then lying in a grain warehouse. No transfer order was given.

On September 4th the sellers were verbally informed that the wheat had been requisitioned by the British Government and on September 8th a written requisition was sent them. The buyers claimed damages from the sellers for non-delivery. Arbitration ensued in pursuance of the rules of the Liverpool Corn Trade Association and the arbitrators referred certain questions in the case to the Court of Kings Bench in pursuance of the provisions of the British Arbitration Act.

The Court held that inasmuch as the delivery of the wheat by the sellers to the buyers had been rendered im-

possible by the requisition, the sellers were excused from performance of the contract in spite of the fact that the contract did not contain any exception.

The case was heard by Lord Reading, Mr. Justice Darling and Mr. Justice Lush.

After determining that title had not passed to the buyers by reason of the fact that there had not been any delivery of warehouse certificates, Lord Reading proceeded to discuss whether the sellers were excused from performance of the contract owing to the requisition and called attention to the fact that the contract was absolute in its terms, and then said, at page 141:

> "No doubt there are cases on either side of the line, and the application of the principles of law are matters of some nicety and difficulty, but I have come to the conclusion that in this case the sellers are excused from performance of the contract, and that the contract must be taken as an undertaking by the sellers to deliver the goods subject to the condition, that if the British Government requisition the goods and render it impossible for the sellers to perform their contract they should be excused from the performance of it. The conclusion at which I have arrived is, I think, supported by the decision in *Nickoll & Knight* v. *Ashton, Edridge & Co.* [6 Com. Cas. 150, 152; (1901) 2 K. B. 126, 132; 70 L. J. K. B. 600, 603], and also by the decision in *Baily* v. *De Crespigny*, [(1869) L. R. 4 Q. B. 180, 186; 38 L. J. Q. B. 98, 102]. The particular passage in *Nickoll & Knight* v. *Ashton, Edridge & Co.* upon which reliance is placed by Mr. Raeburn on behalf of the sellers is in the judgment of A. L. Smith, M. R., where he quotes from the judgment of Blackburn,

J., in *Taylor* v. *Caldwell* [(1863) 3 B. & S. 826 at p. 833; 32 L. J. Q. B. 164, 166], laying down a rule as to the construction of certain contracts, which rule is as follows: 'Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.' It is to be observed that in that rule stress is laid upon the perishing of the thing which was the foundation of the contract before breach. The principle of the case seems to me equally applicable to that now under consideration where by reason of the lawful act of the executive the thing, in a sense, has perished. Certainly through the act of the British Government it is no longer in the power of the sellers to perform their contract. * * *

"It must, however, be clearly understood that we are not by this decision in answer to the questions put to us deciding that if the sale had not been of specific goods that the sellers would have been excused; but it is because the sale was a sale of specific goods and was therefore rendered impossible of performance when the goods were lawfully requisitioned by the British Government that

I come to the conclusion that the sellers are excused."

Mr. Justice Lush dealt with the whole question very neatly at page 143, as follows:

"Whenever it is necessary to consider, as it is in this case, whether a supervening impossibility of performance excuses the contracting party, one must of necessity consider what the nature of the impossibility is, and what has given rise to it. Willes, J., in *Clifford* (Lord) v. *Watts* [(1870) L. R. 5 C. P. 577, 586; 40 L. J. C. P. 36] stated the principle in this precise way: 'Where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him.' In this case the impossibility which supervened after the making of the contract was an impossibility created by an act of State. The moment these goods were requisitioned it became the duty of the vendors to comply with the requisition, and an act of State made it contrary to the duty of the vendors to carry out the contract to the buyers. The case therefore clearly falls within the principle that has been so often acted upon that the vendors are excused from performance of their contract where it is impossible for them legally to perform their obligation owing to an act of State and not through any default on their part. The vendors here have committed no breach of their contract, and I think that the question put by the arbitrators should be answered in the way indicated by my Lord."

In *Nickoll* v. *Ashton* (1901) 2 K. B. D. 126, where the defendant had sold a cargo of cotton seed to be shipped

on the steamship *Orlando* in January, when owing to a stranding of the *Orlando*, without any fault on the seller's part, she was unable to carry the cargo, it was held that the contract was frustrated.

In *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, the lease of a music-hall was held to be frustrated by the destruction of the hall by fire.

In *Appleby* v. *Meyers* (1867) L. R. 2 C. P. 65, there was a contract to supply and instal machinery in a building. After partial instalment, the premises and the machinery were destroyed by fire, and Mr. Justice Blackburn held that both parties were excused from further performance.

In *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1917) 2 K. B. 1; (1918) Appeal Cases 128, there was a contract for the construction of a reservoir in 1914. In 1916 the Ministry of Munitions, under the Defense of the Realm Act, ordered the defendants to stop work and to sell such material as it had on hand to munition factories. This governmental act was held by the House of Lords to have terminated the contract.

In *Marks Realty Co.* v. *Hotel Hermitage Co.*, 170 App. Div. 485 (N. Y.) the defendant agreed to pay for an advertisement of its business in a "souvenir and program" of a certain national yacht race, when the program should be published. The race was cancelled, owing to the European War.

It was held that since the holding of the race was of the essence of the contract, defendant was excused from performance.

The Court said at page 485:

> "This is not where a promisor has failed to guard himself against a *vis major*. It is not a performance on one side, the other having no appropriate clause to excuse default. But it is where the situation, as it turns out, has frustrated the entire design on which is grounded the promise. An advance issue of the programs cannot fairly be held to be what defendant was to pay for. The object in mutual contemplation having failed, plaintiff cannot exact the stipulated payment."

In *Southern Railway Co.* v. *Wallace* (1911) 175 Ala., 72, 56 So. Rep., 714, it was held that quarantine regulations made subsequent to the contract, preventing the shipment of cattle, excused performance.

In *Gesualdi* v. *Personeni* (1911), 128 N. Y. Sup. 683, performance of the contract for the sale of patent medicines was excused upon the sale becoming illegal by subsequent government regulations adopted under the Federal Pure Food Law.

In *Hildreth* v. *Buell* (1854), 18 Barb., 107, failure to perform an agreement to furnish iron for locks in a canal being constructed was excused on account of the subsequent act of the legislature suspending the work.

In *Stewart* v. *Stone*, 127 N. Y., 500, it was held that the performance of a contract to manufacture cheese and butter, market the same and deposit the proceeds to the credit of the plaintiff who delivered milk for that purpose, was excused by the destruction of the factory by fire.

The doctrine of frustration of commercial contracts is an outgrowth of the fact that time is of the essence in such contracts.

Situations constantly arise in which it is necessary that the parties should immediately know what their respective rights are.

As Mr. Justice McKenna put it in the *Allanwilde* case, 248 U. S. 377, on page 386, in dealing with the question of an indefinite embargo:

> "The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecile,* 244 U. S. 12."

When a charterer has made a voyage charter for the carriage of cargo, and has his commitment to the cargo owner to fulfill and when, as here happened, the vessel which he has chartered is prevented from performing the charter party, whatever may be the cause of that prevention, his first instinct and necessity is to secure another vessel to carry the cargo for which he is committed. That is exactly what was done in the present case when the Texas Company, on April 14th, evidently as soon as possible after the requisition, chartered the steamship *Vimeira* to lift the oil cargo which they expected to ship by the *Baron Ogilvy.* 104.

The fact that time is of the essence in these matters is shown by the universal custom of having every charter party contain the so-called cancelling clause providing that the vessel must arrive at a loading or discharging

port on or before a certain date, failing which the charterer has the option of calling the contract off.

When a situation arises, such as arose in this case, it is of the essence of commercial law that the parties should know just what their rights are at the time when the trouble occurs.

The charterer must know that he is not in danger of having the chartered vessel cast back on his hands with a demand for performance on his part and that he may safely go about to arrange other commitments.

The owner, on his side, ought to know whether in case the Government should suddenly change its mind, he would be free to deal with his vessel as he likes.

Suppose in the present case for example, that suddenly the Government had changed its plan about using the *Baron Ogilvy* and had freed the vessel, say, about the 15th or 20th of April and she had proceeded to Port Arthur and arrived there before May 15th and demanded a cargo of oil from the Texas Company. The situation would then have been that the Texas Company would have had both the *Vimeira* and the *Baron Ogilvy* on its hands with, so far as appears, only one cargo with which to load them. It is not difficult to fancy the attitude which the Texas Company would have taken if such a thing had occurred. They, undoubtedly, would have said that the matter was all off when the *Baron Ogilvy* was requisitioned by the British Admiralty, and that the owner could not come back after the Texas Company had got another vessel for the cargo intended for the *Baron Ogilvy* and demand a second cargo. The owner would have had his trip to Port Arthur in vain.

It is to guard against the possibility of just such situations as this that the doctrine of frustration has arisen and is a necessity in commercial law because parties must know their rights at once in order to feel safe in going ahead and making other arrangements when the subject matter of one of their contracts has failed.

It is submitted, that this is the only conceivable, workable commercial theory to be applied when something happens by operation of *vis major*, without fault of either party, which renders it certain that a vessel which has been engaged under a charter party cannot perform her contract.

The result would not have been any different in the present case if the *Baron Ogilvy* had been sunk, without her owners' fault, so that it was obvious she could not be raised in time to perform her contract, or if without her owners' fault she had been so badly burned that it was obvious she could not have been repaired in time to perform her contract. She was, as Judge Hough suggested, as entirely removed so far as the performance of the Texas Company contract was concerned, as if she had been destroyed. 708-709.

It is well settled that in commercial matters a contract for April shipment or delivery is not satisfied by a shipment or delivery in August or September, and so in charter parties a charter under which a vessel is to be delivered in April or May is quite a different charter from a commercial standpoint than a charter in which the vessel is to be delivered in October or November.

In other words, what is contracted for by a charter such as that of the Baron Ogilvy is the commercial service

of the vessel to the charterer for a voyage commencing at the port of loading at the time named. Dorrance v. *Barber,* 262 Fed. 489 (1919); *Cornell &c. Co.* v. *Diederichsen & Co.* 213 Fed. 737; *Bowes* v. *Shand,* 2 App. Cas. 455.

A voyage which would commence in October or November is not the same voyage in a commercial sense, although the port of loading and destination might be the same.

It is perfectly clear, therefore, that the fact that the requisition rendering the commercial voyage intended absolutely impossible of performance, put an end to the charter party and excused both parties from any liability for damages.

This is the principle underlying the decision of the Circuit Court of Appeal for the Second Circuit in the case of *Lewis* v. *Mowinckel,* 215 Fed. 710 (1914), affirming a decision by Judge Ward, in which a libel was filed by the charterer of the steamship *Moldegaard* to recover damages from her owner for failure to perform a charter party dated September 16, 1911. The charter was for about one year, beginning from the time of her delivery to the charterer, upon the completion of a charter to the Munson Steamship Line, which was then being performed. The flat period of the Munson charter expired January 7, 1912. While under the Munson charter the *Moldegaard* stranded on one of the Bahama Islands, was given up as lost, finally was salved, and was again ready for service in February, 1913.

This Court emphasized the fact that the parties when they were entering into a charter could not be interpreted to have intended a charter which began more than a year

after the expiration of the Munson charter on January 7, 1912, and said, at page 711:

> "We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, release them from liability under the charter. It excused both parties, but did not make a new contract."

The same point is emphasized in the opinions of the House of Lords in the case of *Bank Line, Ltd.* vs. *Arthur Capel & Co.*, (1918) 35 T. L. R. 150.

In that case a steamship, the *Quito*, was chartered from her owners by a charter party dated February 15, 1915, with delivery date not before April 1st or after April 30th. The charterers did not cancel, although the vessel was not ready by the cancelling date, and whilst the vessel was preparing for service under the charter she was requisitioned by the British Admiralty for an indefinite period.

In August, 1915, the owners received an offer from third parties for the purchase of the vessel provided they could get her released from the requisition. They succeeded in getting her released by substituting another vessel belonging to them. The next day the charterers called on the owners to deliver the vessel under the charter. The owners contended that the charter had been frustrated by the requisition and in an action by the charterers against the owners for a declaration that the charter had not been frustrated, the House of Lords held that it had been frustrated and that the requisition ended

all rights between the parties and left the owners free to sell the vessel as they had done.

The Lord Chancellor, Lord Finlay, said, 35 T. L. R. at page 152:

> "The charter was to be for 12 months from delivery, which the owners were to make by the end of April unless prevented by unforeseen circumstances, in which case the charterers had the option of cancelling, however short the delay. If, owing to unforeseen circumstances, it became impossible for the owners to deliver under the charterparty until many months after the end of April, the whole character of the adventure would be changed. A charter for 12 months from April was clearly very different from a charter for 12 months from September. In such a case the adventure contemplated by the charter was entirely frustrated, and the owner when required to enter into a charter so different from that for which he had contracted was entitled to say '*non haec in foedera veni*'."

Lord Sumner, who is generally considered by the English bar as the best commercial Judge in England at the present time, said at page 153 (italics ours):

> "What then was the nature of the charter? It was not in form an April to April charter but it was sufficiently so in substance. If the ship had been placed at the disposal of the charterers when released by the Admiralty, she would virtually have been in their hands for a September to September hiring. The mere change in the initial month of the actual hiring was not quite the point, for this was not the old comparison of a summer with a winter voyage. In either case she would

have been on hire for each month of the twelve and the exact cycle of the seasons would make little difference to her. What was important was this. During all the months of the *Quito's* service for the Admiralty the charterers would not in the least know when, if ever, they would have her on their hands. They could not tell whether they might suddenly have to find employment for her, or whether they must make provision for the current necessities of their trade without counting upon her at all. In one respect they would be at an indubitable disadvantage. The postponement of the beginning of her hire at any rate brought nearer the end of the war, after which the charterers would have to pay war rates for the ship and only have the use of her in peace employment. In the latter respect the owners' position also would be one of indecision, for their business was one that required that they should look ahead and in doing so they could not tell when, if at all, they were to have the *Quito* once more on offer. These uncertainties in commerce were very serious. *Lord Justice Scrutton asked himself if the September to September employment would be in substance the same employment as that from April to April. He* (*Lord Sumner*) *agreed with him that it would not, and he thought that the uncertainties of the intervening period in time of war both emphasized the difference between the two and added to the gravity of the lapse of time taken by itself.*"

Later on, in his opinion, Lord Sumner adopted, as the best definition of a frustration which results in the dissolution of a commercial contract, a remark of Lord Dune-

din in *Metropolitan Water Board* v. *Dick, Kerr & Co.*, (1918) A. C., at page 128, which was:

> "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted."

At page 156, after discussing other definitions and the nature of frustration, Lord Sumner said (italics ours):

> "For his own part he inclined to prefer the expression already quoted from his noble and learned friend Lord Dunedin, and substantially adopted by Lord Justice Scrutton in the Court of Appeal.
>
> "*Applying these considerations, he was of opinion that the requisitioning of the Quito destroyed the identity of the chartered service, and made the charter, as a matter of business, a totally different thing. It hung up the performance for a time, which was wholly indefinite and probably long. The return of the ship depended on considerations beyond the ken or control of either party.* Both thought its result was to terminate their contractual relation, and as they must have known much more about it than his Lordship, there was no reason why he should not think so too. He would allow the appeal."

Lord Wrenbury in his opinion, 35 T. L. R., at page 156, dealt with the question of the change of the time of service on the same principle.

In the case of *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1918), A. C. 119, the same point was stressed by

Lord Dunedin, at page 128, who referred with approval to the old case of *Jackson* v. *Marine Insurance Co.* (1874), L. R. 10 C. P. 125, in which the same point was involved.

The principle of frustration is pointedly illustrated by the decision of Mr. Justice Atkin, now Lord Justice of Appeal, in the case of *Lloyd Royal Belge Soc. Anon.* v. *Stathatos*, 33 T. L. R. 390; affirmed 34 T. L. R. 70, which was the case of a voyage charter party on a time basis made December 1, 1916, whilst the vessel was at Gibraltar.

On December 2nd the vessel was detained by British authorities, because of her nationality and held until February 10, 1917. On December 12, 1916, the charterer gave notice that he considered the charter at an end.

The action was brought by charterers under the English practice for a declaration that the charter party was terminated, and for recovery of hire paid in advance.

Mr. Justice Atkin, in the Court below, said in the course of his opinion:

> "The substantial point that the plaintiffs raised was that the common adventure contemplated by both parties was frustrated by the detention and that the contract was thereby dissolved. * * * As to the doctrine of the frustration of the adventure, I have the advantage of a definition by my brother Bailhache approved by the Court of Appeal in *Admiral Shipping Company* v. *Weidner, Hopkins and Co.* (33 *The Times L. R.* 71; (1917) 1 K. B., at p. 242), where he said: 'The commercial frustration of an adventure by delay means, as I understand it, the happening of some unforeseen delay without the fault of either party

to a contract of such a character as that by it the fulfilment of the contract in the only way in which fulfilment is contemplated and practicable is so inordinately postponed that its fulfilment when the delay is over will not accomplish the only object or objects which both parties to the contract must have known that each of them had in view at the time they made the contract, and for the accomplishment of which object or objects the contract was made.' ''

* * * * *

"But in this case it appears to me that the only adventure contemplated was one voyage outwards to New York and thence to Havre—a voyage which both parties knew the charterers desired to commence and end as quickly as possible. It is true that the parties adopted a form which is applicable to time charters and was called a time charter. In substance, the adventure was a charter for a voyage with freight payable at a time rate. In such circumstances the detention in question by the British Government for reasons of State, which would not be fully known to the parties, and for a period the duration of which must be uncertain and might be prolonged, appears to me to be just such a delay as falls within the doctrine as defined in the words I have quoted. I think, therefore, that the contract was dissolved by the happening of the detention, and I think that it was dissolved as from the date when the detention began, viz., on December 2. Should the right view be that the contract is not dissolved until one of the parties elects to declare it dissolved, then the contract would be dissolved on December 12."

He also held that no recovery could be had of the hire paid in advance.

In the Court of Appeal the judgment was affirmed.

Lord Justice Pickford said at page 72:

> "It was said that the charter was at an end because of what he would call for convenience the frustration of the adventure according to the doctrine laid down by Lord Haldane in the *Tamplin* case (32 *The Times L. R.*, 677; (1916) 2 A. C., 397). It was not necessary to repeat the words used by Lord Haldane in that case. It was established that so far as this Court was concerned the doctrine which he would call the doctrine of commercial frustration of the adventure did apply to a time charter as well as to a voyage charter, and the question arose whether on the facts of this case the doctrine was applicable. He thought that the case was very near the line. But Mr. Justice Atkin had held that on the facts there was such an interruption of the common object of the parties as amounted to a frustration of the commercial adventure and that therefore the contract was dissolved. He (his Lordship) saw no reason to differ from the learned Judge's decision."

The hire paid in advance was not recoverable because:

> "They could only recover the money by virtue of some provision in the contract, and as the contract had come to an end there was no provision under which the money could be recovered. The charterers were not entitled to recover back the hire paid in advance. The appeal must be dismissed."

It is submitted that the *Lloyd Royal Belge* case goes further than the court is asked to go in this case, because the detention there might well have been of a more or less temporary nature whilst here the requisition would obviously wholly prevent the contemplated voyage being made at the contemplated time.

To the same effect as the decisions above quoted are the decisions of the English Court of Appeal in the cases of the *Scottish Navigation Co., Ltd.* v. *W. A. Souter & Co.*; the *Admiral Shipping Co.* v. *Weidner Hopkins & Co.* (1917), 1 K. B. 222, which were heard together in the English Court of Appeal.

(7) *The cases cited by the Appellant, in which it is held that foreign governmental interference is not an excuse for non-performance of the contract, are distinguishable from this case on the ground that the governmental interference therein mentioned did not involve destruction of the subject matter of the contract.*

Furness Withy & Co. v. *Rederiaktiebolaget Banco*, 23 Com. Cas. 99, 103, was not a case of frustration. The Court, in that case, merely held that under the terms of the charter which included a "*restraint of princes*" clause the charterer was entitled to use a Swedish vessel only between such ports as the Swedish Government permitted.

There is a dictum to the effect that if there had been no "restraint of princes" clause the mere fact that the contract was illegal under the law of a foreign state to which one of the contracting parties belonged, would not

make the contract illegal or unenforceable if it were an English contract to be construed and enforced according to English law.

The appellee herein need not deny this dictum. His contention is simply that where the subject matter of the contract has been, in effect, *swept out of existence* by some *vis major* it is immaterial that this result is caused by the action of a *foreign* government. It will be noted that in this *Banco* case the vessel was not taken from the parties. The vessel could still be used, between Swedish ports. This narrowed the range of her use, but did not prevent it.

A similar situation often arose in respect to British time chartered ships during the war, when German and Austrian ports were illegal for them yet the charter continued operative for use to non-enemy ports. The charter was merely narrowed not destroyed.

Rederiaktiebolaget Amie v. *Universal Transportation Company, Inc.*, 250 Fed. 400 (1918), involved a contract to purchase a Swedish ship, payments being made in the form of charter hire, the owner to deposit a bill of sale of the vessel with an American Trust company. The deposit of the bill of sale was not made, the owners claiming that Swedish law prevented.

The Court below held this was no excuse and in the Circuit Court of Appeals for the Second Circuit Judge Ward, speaking for the court, said:

> "No action of the Swedish Government would excuse the defendant from its covenant to do so (deposit a bill of sale), there being no exception in the agreement like that common in charter parties

and bills of lading, of arrests and restraints of princes. *Nor did the evidence adduced show any such restraint by the Swedish Government.* Therefore the Court properly held as a matter of law that the defendant having had from December 10, 1915 to April 5, 1916 to deposit the bill of sale with the United States Mortgage and Trust Company, had breached its contract in not doing so."

As the evidence failed to show restraint by the Swedish Government, the Court's statement as to the possible result if the Swedish Government had prevented the deposit of the bill of sale, is, it is submitted, pure dictum.

This contract of sale had been entirely executed on one side. The vessel had not been requisitioned by any government or otherwise removed from the control of the parties. Therefore this case cannot be considered as an authority in the instant case, because the subject matter of the contract—the use of the vessel—was not removed from the control of the parties in such a way that the purpose of the contract could not in part at least be accomplished.

If Sweden had seized the *Ada* the situation would be different.

Jacobs v. *Credit Lyonnais* (1884), L. R. 12 Q. B. D 589, was a contract made by two Englishmen for the sale of 20,000 tons of esparto to be shipped from Algeria to England. Nine thousand tons were in fact shipped and shipment of the balance was prevented by insurrection in Algeria, the workers being intimidated and the military authorities by their commands preventing collection of esparto.

It should be noted that this was not a separable contract, but one for the delivery of *20,000 tons,* of which almost one-half had been delivered. There was therefore no sweeping away of the *whole* subject matter of the contract. The purpose having been almost fifty per cent. accomplished, the Court could not look at the unperformed part as a separate contract for the delivery of 11,000 tons, but was compelled to consider the whole contract.

The case is, therefore, not on all-fours with the present case, where the whole subject matter was entirely removed from the control of the parties and no part of the purpose of the contract had been or could be accomplished.

The cases of *Liverpool* v. *Phenix Insurance Co.,* 129 U. S. 397, and *China Mutual Insurance Co.* v. *Force,* 142 N. Y. 90, are to the effect that unless the parties have some other law in mind at the time of making a contract its construction, nature and obligation are to be determined by the law of the place where it is made. Where one party, therefore, has an excuse for non-performance under some foreign law, if the excuse is not valid under the *lex loci contractus* he will not be excused.

The appellant has cited various other cases which are not authorities against the proposition that the charter party was frustrated in this case.

We have ventured to add as Appendix B to this brief a differentiation of the principal cases cited by the appellant from the situation that existed in the instant case.

The respondent herein claims a good defense *under American law,* hence these cases are beside the point.

Tweedie Trading Co. v. *James P. McDonald Co.*, 114 Fed. 985 (1902) was similar to the English case of *Jacobs* v. *Credit Lyonnais*, L. R. 12 Q. B. D. 589, in that the contract had been partly performed and therefore the whole subject matter of the contract was not swept away in the same manner as in the instant case.

It was not a charter party case, but a breach of contract to supply laborers, full performance of which was prevented by the law of Barbados.

The distinction which the appellee calls to the attention of the Court is exactly the one which was taken by Judge Hough below. He said, 707-709:

> "The fact that the interfering action was governmental and foreign, has been the groundwork or moving cause of libelant's action. That is, reliance is placed on decisions holding that foreign governmental *vis major* preventing performance does not excuse. No decision binding on this court goes so far as to state the rule as above argued for. Whether the English cases touching on the matter can be reconciled, I more than doubt, but am not much concerned with: but neither *Liverpool &c. Co.* v. *Phenix*, 129 U. S. 397, nor *The Ada*, 250 F. R. 400, decided more than that one who in this country made a lawful contract, not in accord with the law of his own country, could not plead the foreign law to prevent his paying damages.
>
> "That is a very different thing from destroying (in a very real sense) the subject matter of agreement. If it be true as I believe it to be, that for the purpose of this suit the *Ogilvy* was or became non-existent, then the governmental element becomes as unimportant as the foreign, also the

> absence of the 'restraint' clause, and the question is really reduced to its lowest terms, viz: whether the facts present a case of that 'impossibility of performance' which is and long has been a recognized and growing reason for dissolving a contract."

The *Baron Ogilvy* charter was, therefore, terminated by what was in effect a destruction of the subject matter and all contract relations between the libelant and respondent which had arisen by reason of their having entered into the charter were entirely ended because:

1. The ship was entirely taken away from the charterer's service by Governmental *vis major* without fault on the part of the shipowner.

2. At the time the requisition was made the libelant did not expect and a reasonable business man would not have expected that the steamship would be returned in time to perform the chartered voyage in view of the government's need for mule-carrying ships for its military operations.

3. The vessel was in fact not released from the requisition until a period much greater than would have been required for performance of the charter.

II. If the Court should find that there was not a frustration of the contract of charter party, whereby the rights and obligations of the parties thereto were terminated, respondent Hogarth Shipping Company, Limited, is not liable for failure to tender the

They were a part of the contract when it was signed. This is shown by the charter party itself, *Libelant's Exhibit 2*, 470-473, concerning which Mr. Mouris, who acted as agent for the respondent Hogarth Shipping Company, Limited, testified. *Mouris*, 109-110.

The special clause which was attached to the charter party at the time of signing is, in part, as follows:

> "It is a condition of this charter and the charterers undertake that:—
>
> (1) The ship shall be employed only in such trades and employments and shall carry only such goods, persons and things as are lawful for a British ship.
>
> * * * * * * *
>
> (3) There shall not be any breach of any of the warranties which are now or may during the continuance of this charter be contained in the policies or contracts of insurance of the ship with the War Risks Insurance Association in which the ship is entered. The warranties now contained in such policies are as follows:
>
> (a) *That the ship shall comply, so far as possible with the orders of His Majesty's Government and the directors of the Committee as to routes, ports of call and stoppages.*
>
> (b) *That the ship shall not start on the voyage if ordered by His Majesty's Government not to do so.*
>
> * * * * * * *

> Upon breach of any of the conditions and undertakings mentioned in this clause, the owners shall have the right at any time to withdraw the ship from the service of the charterers, but notwithstanding such withdrawal the charterers shall in addition to any liability for damages, continue liable for the hire or freight hereby agreed to be paid.
>
> The above clauses to be incorporated in all bills of lading." 469-473.

These clauses amount in effect to a restraint of princes clause or at least to a provision that the vessel would be excused from not performing any voyage which the British Government forbade. They undoubtedly did forbid the charter voyage in the present instance.

The effect of the incorporation of such clauses in a charter party in excusing non-performance by the owner is evidenced by the case of *The Athanasios*, 228 Fed. 558, where the charter did not contain any *restraint of princes* exemption, but in which it was provided that bills of lading given under it should contain such a restraint. Judge Hough excused an owner from performance of a voyage charter on that ground.

Consequently, it is submitted the special voyage charter clause operates as an exception excusing non-performance of the contract by the owners.

III. THERE IS NO LIABILITY ON THE PART OF RESPONDENTS HUGH HOGARTH AND SONS FOR FAILURE TO TENDER THE STEAMSHIP *Baron Ogilvy* OR SOME OTHER STEAMSHIP FOR PERFORMANCE OF THE CHARTER PARTY.

Respondent Hugh Hogarth and Sons did not own the Steamship *Baron Ogilvy* or any other vessel. *Hogarth,*

136, 139, 167-169. *Thompson*, 399, 400, 434. They were managers of the Hogarth Shipping Company, Ltd. 135. They acted throughout as agents, *Hogarth*, 136, 169-170, *Thompson*, 400, for an undisclosed principal whom the libelant has elected to sue.

Their agency is not disputed and appellant apparently admits that they are not subject to liability in this suit, a fact which, it is claimed, was not clear when the libel was originally filed, 88-89.

IV. If the appellant has any claim against anyone its claim lies against the British Government for having taken from it the use of the Steamship *Baron Ogilvy*.

If the libelant has suffered any damage by reason of the act of the British Government its remedy lies by proceedings in the British Courts by petition of right against the British Government.

This is the intimation of the libelant's proper remedy in the event of a frustration of a time charter party by requisition contained in *Chinese Mining & Engineering Co., Ltd.* vs. *Sales & Co.* (1917), 2 K. B. 509, at the top of page 602.

It is settled that such a petition is maintainable by an American citizen or corporation because of the reciprocal rights given in our Courts for suits against the Government by English citizens.

United States vs. *O'Keefe*, 11 Wall. 178;
Statutes of 23rd and 24th Vict. July 3, 1860.

An instance where a British steamship owner was allowed to sue the United States Government in the Court of Claims is the case of *Maclay* vs. *U. S.*, 43 Court of Claims 90, and an instance of suit under the Tucker Act in our District Court is the case of the *New York & Oriental S. S. Co., Ltd.* vs. *U. S.*, 202 Fed. 311; 216 Fed. 61, which was tried before Judge Learned Hand and affirmed by the Court of Appeals.

In that case a stipulation was entered into by the District Attorney here that the statutes above mentioned and *U. S.* vs. *O'Keefe*, 11 Wall. 178 should be received as evidence of the fact that the Government of Great Britain accords to citizens of the United States the right to prosecute claims arising from express or implied contracts against the Government of Great Britain in the Courts of that country.

Thus the appellant is not remediless if it can make out a proper case. It has merely mistaken its remedy and its claim, if it has any, is against the British Government direct, not against the ship-owner who has been guiltless of any breach of contract and whose charter party to the appellant was frustrated by the action of the British Government.

LAST POINT.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

October, 1920.

Respectfully submitted,

JOHN M. WOOLSEY,

HARRISON LILLIBRIDGE,

Of Counsel.

APPENDIX A.

Leading Cases on Frustration.

Cases relating to pure voyage charters or voyage charters on a time basis:

Lloyd Royal Belge Soc. Anon., 33 T. L. R., 390; 34 T. L. R. 70.

Allanwilde Transport Corporation v. *Vacuum Oil Co.* (1919), 248 U. S., 377.

Admiral Shipping Co. v. *Weidner, Hopkins & Co.*, 33 T. L. R. 71; (1916) 1 K. B. 429; (1917) 1 K. B. 222.

Civil Service Society, Ltd. v. *General Steam Navigation Co.* (1903) 2 K. B. D. 756.

Scottish Navigation Co. v. *Souter & Co.* (1916) 1 K. B. 675; (1917) 1 K. B. 222.

Geipel v. *Smith* (1872) L. R. 7 Q. B., 404; 1 Asp. Mar. Cas. 268.

Jackson v. *Union Marine Ins. Co.* (1874) L. R. 10 C. P. 125.

Cases Relating to Pure Time Charters:

Bank Line, Ltd. v. *Arthur Capel & Co., Ltd.*, 35 T. L. R. 150. (1918, House of Lords.)

Anglo-Northern Trading Co. v. *Emlyn, Jones & Williams* (1917) 2 K. B. 78; (1918) 1 K. B. 372.

The Countess of Warwick Steamship Co. v. *Le Nickel Soc. Anonyme* (1918) 1 K. B. 372; 34 T. L. R. 27.

Heilger's v. *Cambrian Steam Navigation Co.*, 33 T. L. R. 348; 34 T. L. R. 72.

F. A. Tamplin S. S. Co. v. *Anglo-Mexican Petroleum Co., Ltd.* (1916) 1 K. B. 485; (1916) 2 A. C. 397.

Chinese Mining and Engineering Co. v. *Sale & Co.* (1917) 2 K. B. 599.

Lewis v. *Mowinckel*, 215 Fed. 710.

Isle of Mull, 257 Fed. 798.

Capel v. *Soulidi* (1916) 1 K. B. 439; (1916) 2 K. B. 365.

Furness, Withy & Co. v. *Rederiaktiegolabet Banco* (1917) 2 K. B. 873.

Earn Line Steamship Co. v. *Sutherland Steamship Co.* 254 Fed. 127 (1918); affirmed in C. C. A. February 18, 1920.

Gans S. S. Line v. *The British Steamship Frankmere*, 262 Fed. 819 (1920).

Cases relating to contracts other than charter parties:

Shipton-Anderson & Co. v. *Harrison Brothers Co.* (1915) 21 Com. Cas. 138.

Metropolitan Water Board v. *Dick Kerr & Co.* (1917) 2 K. B. 1; (1918) A. C. 119.

Appleby v. *Meyers* (1867) L. R. 2 C. P. 65.

Taylor v. *Caldwell* (1863) 3 B & S 826.

Nickoll v. *Ashton* (1901) 2 K. B. D. 126.

Howell v. *Coupland* (1876) 1 Q. B. D. 258.

Krell v. *Henry* (1903) 2 K. B. D. 740.

Stewart v. *Stone*, 127 N. Y. 500.

Marks Realty Co. v. *Hotel Hermitage Co.*, 170 App. Div. 485 (N. Y. 1915).

Southern Railway Co. v. *Wallace* (1911) 175 Ala. 72; 56 So. Rep. 714.

Gesualdi v. *Personeni* (1911) 128 N. Y. Sup. 683.

Hildreth v. *Buell* (1854) 18 Barb. 107.

Jones v. *Judd* (1850) 4 N. Y. 412.

APPENDIX B.

Cases cited by appellant's counsel analyzed and distinguished.

1. The following cases mentioned at page 31 of petitioner's brief relate to whether the fact that foreign law prevents performance of the contract at the place where it is to be performed is an excuse under the *lex loci contractus*. As the appellees claim a frustration *under American law*, these cases are beside the point.

Lloyd v. *Guibert*, 6 Best & S. 100.

Liverpool v. *Great Western Company*, 129 U. S. 397.

China Mutual Insurance Company v. *Force*, 142 N. Y. 90.

2. *Howland* v. *Greenway*, 22 Howard 491, was a case of seizure of goods by the authorities in Rio de Janeiro, because the manifest was improperly made out. In an action on the bill of lading, recovery was allowed because the master of the vessel was negligent in not acquainting himself with the laws of the country with which he was trading, and duly conforming thereto.

3. *The Harriman*, 9 Wall. 161 (1868), involved a failure to deliver under an entire contract and it was held that since there was no delivery, no freight was due. There was no destruction of the subject matter of the contract in this case.

4. *The Progreso,* 50 Fed. 835 (1892), was not the taking of a ship, but merely a prevention of its use under the charter party, for a definite period of one month, known in advance. This is quite different from a requisition for an indefinite period.

5. *McDermott* (Ingle) v. *Jones,* 2 Wall. 1 (1864), held that a builder of a house, under contract, on land in which there was a latent defect which required subsequent repairs, was not excused by the latent defect from paying for the subsequent repairs. This is a quite different case from the instant case. If the land had *disappeared* in some manner it might have been analogous. It only involved greater difficulty and expense in performing the contract than was contemplated.

6. In *Blackburn Bobbin Company* v. *T. W. Allen, Ltd.,* 23 Com. Cas. 471, in the Court of Appeal in England, there was a contract to deliver timber from Finland on railroad tracks at Hull. Owing to the war the timber had to be sent via Scandinavia, instead of direct. It was held that the contract was not frustrated on the specific ground that the means of transportation of the timber was not of the essence of the contract and appeared to be unknown to the plaintiff. The Court very carefully distinguished the question involved from the question of frustration of charter parties, and said at page 472:

> * * * "There is really nothing to show that the continuance of that normal method (of transportation) was at the basis of the contract in the minds and intention of the contracting parties. The contract was merely one for the delivery of a

certain quantity of Finnish timber, free on rail at Hull. The plaintiffs did not know how the timber was normally conveyed from Finland to Hull and I see no reason for holding that the normal mode of conveyance must be deemed to have been in their mind and intention."

7. In *Hudson* v. *Hill*, 2 Asp. Mar. Cas. 278 (1874), a vessel was chartered to carry sugar from Barbados to London. The charter was made December 28, 1870, the vessel to "proceed forthwith" to loading port, laydays not to commence before April 1st. There was not any cancelling date in the charter. Owing to excepted perils, the vessel did not arrive until July 28th, which was the very end of the sugar season. The charterer refused to load and the vessel left for other business. The owner sued for breach of contract and the jury found that the date of arrival did not put an end, in a commercial sense, to the adventure. A verdict for the plaintiff was directed and the Court of Common Pleas discharged a rule to set aside the verdict, as against the evidence, saying that it was not impossible to load, although it was perhaps impossible to load at a profit.

The principle of frustration was therefore clearly recognized, but on the particular facts of the case it was found that the contract was not frustrated. We are not given the circumstances in detail, upon which the jury arrived at their conclusion and, therefore, it is submitted that the case cannot properly be considered as against the contention of the respondents in the instant case that the charter party of the *Baron Ogilvy* was frustrated.

Furthermore, *Hudson* v. *Hill* did not involve any

taking of the vessel or removal of it from the control of the parties, but simply a delay in reporting at loading port, which is quite a different matter.

8. *The Star of Hope,* Fed. Cas., No. 13,312 (1866), was a case of a voyage charter party to carry cargo from a port in Maine to Fort Gaines, Alabama. There was a delay in reporting at loading port, caused by excepted perils. The charterer repudiated the contract, but it was held that the charter party was not frustrated by the delay. No taking of the vessel was involved and the cargo in question was actually carried by the vessel, the parties agreeing to litigate the question of whether freight was payable at the rate of the original charter or the rate of a subsequent charter. The Court held that the original charter rate should be allowed, because the charter party had not been frustrated.

9. *Barker* v. *Hodgson* (1814), 3 Maule & S. 269, did not involve any taking of the vessel, but merely a prohibition of intercourse between the vessel and the shore at the loading port, because of pestilential disease.

10. *Ashmore* v. *Cox,* L. R. (1899) 1 Q. B. D. 436, involved a contract to sell hemp to be shipped from a port in the Philippines, by sailing vessel, between May 1st and July 31, 1898. There was a provision that if the goods did not arrive, from the loss of the vessel or other unavoidable cause, the contract was to be void. It was stated that owing to the Spanish-American War the shipment could not be made, but it does not appear in just what way shipment was prevented. A shipment was

subsequently made by steamer on September 15th, and the shipment was declared under the contract, by the sellers, on October 27th. The buyers refused to accept the declaration.

It was held that the declaration was defective; that a proper declaration was a condition precedent; that there was no implied condition of impossibility of performance and that the express exception only applied to goods shipped between May 1st and July 31st, and hence was inapplicable to the goods declared. The Court therefore gave the intended purchasers judgment against the sellers, for breach of contract.

The nature of the impossibility of performance in this case is not stated, but the case is clearly distinguishable from the instant case, because *no specific goods were involved*, and, as the Court intimates at page 442, if the sellers had declared hemp shipped between May 1st and July 31st, the sellers might have escaped liability.

Lord Russell said at page 442:

> "The ship was not, as it were, ear-marked. The seller might appropriate to the contract any shipment of proper quality, by sailer or sailers within the stipulated dates."

This being so, it cannot be said that the subject matter of the contract was destroyed. The trouble was that the only declaration of goods which was made was void.

11. *Carnegie Steel Company* v. *United States*, 240 U. S. 156 (1916), was a government contract for eighteen-inch steel plates, in manufacturing which the Steel Company met with unforeseen and very serious difficulties,

fact that the Peruvian authorities only permitted this particular vessel to load the amount which was actually loaded. It was held that inasmuch as it was the charterer's duty to procure the permit and there was no allegation that the vessel was in an improper condition to load the full cargo, the owners were entitled to recover.

This was not a separable contract and was partially performed and rests on the ground of a breach of duty on the part of charterers.

15. *Beebe* v. *Johnson*, 19 Wend. 500 (1838), was a contract to perfect in England a patent, so as to insure the plaintiff the exclusive use in Canada. It later developed that the right was not given by England, but by the Canadian Government and only granted to the subjects of Great Britain or residents of the provinces, and hence could not be granted to the plaintiff.

It was held that this was not an excuse for non-performance and that the plaintiff was entitled to damages.

This is a case of a contract to do something which was impossible at the start and not a case of a contract which was perfectly possible when made, but was rendered impossible by a supervening act, which swept away the subject matter of the contract.

16. *Holyoke* v. *Depew*, Fed. Cas. 6652 (1868) was a voyage charter of a vessel to carry goods from the Canary Islands to New York. Upon arrival the authorities would not permit part of the cargo to be loaded, as the vessel came from an infected port.

It was held that inasmuch as the vessel was in fault in not being in proper condition to receive the cargo, in an action by the owner to recover freight on the goods actually carried, the charterer might set off damages caused by the vessel's failure to load the other cargo up to the amount of the freight on the cargo actually carried.

This is not a taking of the subject matter of the contract in any manner, but a default of the vessel.

17. In *Jones* v. *Holm*, L. R. (1867) 2 Exch. 335, a vessel when partly loaded with cargo caught fire and was scuttled. The cargo which was on board and was damaged was sold at auction. The cargo which had not yet been loaded, was forwarded by another ship. The vessel was raised, repaired and tendered by the owners for the remainder of the cargo, two months after the date of the fire. The charterers repudiated the charter party.

The Court held that there was no frustration.

In reaching this result Baron Bramwell said:

> "The first objection made by the defendant was that in the circumstances under which the delay caused by this accident occurred, the voyage became a different voyage; that the 'original voyage' was frustrated and the case is therefore within the rule which in the case of such frustration excuses the charterer from loading. *I do not, however, think that the facts stated have this effect. Nothing was said to show that the two months lost made the voyage a different voyage from that agreed for* * * *."

This is another case where on the facts the charter party was held not to be frustrated by the delay in that particular case. It is submitted that this case is, however, quite different from the instant case. The delay was not of indefinite extent, but could be calculated in advance and was within the full knowledge of the parties.

18. *Hasler* v. *West India Steamship Company*, 214 Fed. 862 (1914), turns on the question of equitable estoppel and right of cancellation, and has no relation to frustration.

19. *Hurst* v. *Usborn* (1856), 18 C. B. 141, is another case of delay in arriving at loading port, which involved no destruction of the subject matter of the contract. The ship reported within the terms of the charter and found the charterer in breach of his obligation because he was without ready cargo. This is quite different from the instant case.

20. *The Assicurazioni Generali & Schencker & Co.* v. *Steamship Bessie Morris Co., Ltd.* (1892), 7 Asp. Mar. Cas., 217, was the case of a vessel chartered to carry from Adriatic ports to London. She loaded and sailed, but became disabled by stranding in the course of her voyage. The vessel was seriously injured and the shipowner refused to continue his voyage, but in an action by the charterer it was held that since the vessel was commercially capable of being repaired and proceeding with the voyage within a reasonable time, the shipowner was liable for non-performance and did not have a right to abandon the voyage.

The vessel was at all times within the control of the parties and whether she could be repaired and returned to service within a reasonable time could be ascertained by them. On this ground the case is clearly distinguishable from the instant case.

21. The following cases turn upon the consideration of the particular contract in question:

United States v. *Gleason*, 175 U. S. 588.
Chicago, Milwaukee, etc. Railway v. *Moore*, 240 U. S. 165.

22. *Atkinson* v. *Ritchie* (1809), 10 East 530, involved a voyage charter to carry goods from St. Petersburg to England. When only partly loaded the Master sailed in consequence of a rumor that an embargo was about to be placed on all English ships. The Master was held liable to the charterer for not loading a full cargo.

There was no actual seizure of the vessel in this case and the Master acted improperly. It is therefore different from the instant case.

23. In *Ye-Seng Company* v. *Corbitt*, 9 Fed. 423, a vessel was chartered to carry passengers from Hongkong to Portland. Upon arrival the port authorities, owing to her condition, would not permit her to load passengers. The charterer sued the owner on the contract and recovery was allowed on the ground that the contract had been breached because the vessel was not safe to carry passengers.

This case merely holds that an owner cannot tender an unfit vessel which the port authorities will not permit

to perform their contract and then, having created the difficulty through his own fault, claim that the contract has been frustrated by the port authoriies.

24. *Columbus Railway Power & Light Co.* v. *City of Columbus*, 249 U. S. 399 (1919). The city, by an ordinance which was accepted by the Street Railway Company, had a contract binding the railway to furnish street railway service for twenty-five years, at a specified rate, in return for the use of the streets. During the period the contract became unprofitable to the Street Railway Company, owing to the increase of wages allowed employees by the War Labor oRard. It was held that the Railway Company must still perform its contract.

Mr. Justice Day, who delivered the opinion of the Court, says, at page 410:

> "There is no showing that the contracts have become impossible of performance. Nor is there any allegation establishing the fact that taking the whole term together the contracts will be necessarily unprofitable. * * * There is no showing in the bill that the War or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here the intervention of that superior force which ends the obligation of a valid contract by preventing its performance."

On these grounds the case is clearly distinguishable. This case was decided April 14, 1919. At page 413

the Court discusses the case of *Metropolitan Water Board v. Dick Kerr & Company, Ltd.*, (1918) A. C. 119, distinguishes it from the case which was then before the Court, on the ground that the interruption in the *Metropolitan* case was of such character and duration as to make the contract when resumed a different contract from the contract when broken off, and also on the ground that the *Metropolitan* case involved a direct intervention of the power of the government.

25. *The Sun Printing and Publishing Association* v. *Moore*, 183 U. S. 642 (1901), was an action by the owners against the charterers of a yacht used for dispatch purposes during the Spanish-American War. The vessel was lost in the course of the employment and the Court held that under the various contracts existing between the parties the charterer had agreed to pay the value stated in one of the contracts, in case the vessel should be lost.

This was not a case where a charterer was suing because an owner did not tender a vessel under a charter, and the principle of frustration was not involved therein.

26. *Berg* v. *Erickson*, 234 Fed. 817 (1916), was a contract to furnish to one thousand cattle "plenty of good grass, salt and water," during the grazing season of 1913, at a certain rate per head. By a drought which amounted to "an act of God," full performance became impossible from July to October, but the performance contracted for was good during May and June and sufficient grass was given during the remainder of the season to keep the cattle alive and maintain their weight.

The Court held that damages were due for the failure to perform fully from July to October.

In the course of his opinion Mr. Justice Sanborn mentions that there were authorities to the effect that where performance of a contract becomes impossible through the destruction of the subject matter, without fault of either party, the contract is frustrated. But he indicates that inasmuch as no decision of the Supreme Court nor of any Federal court to that effect had been cited or discovered, he felt bound to adopt a contrary rule.

It is submitted that the case of *The Allanwilde* and other cases in the Circuit Courts of Appeal and District Courts, cited by the appellees, sufficiently show that this is not the case at present.

Berg v. *Erickson* is distinguishable, however, on the ground that the contract was performed in full for a part of the time and partially for the balance of the time.

27. *Hadley* v. *Clarke*, 8 Term. Rep. 259 (1799) shows the common law strictness. In that case the vessel was chartered to carry from Liverpool to Leghorn. While she was awaiting convoy at Falmouth, the Privy Council laid an embargo on all vessels proceeding to Leghorn July 27, 1796. The embargo was not raised until October 24, 1798. In August, 1798, the vessel returned to Liverpool and discharged her cargo, which the shipper received without prejudice and upon the lifting of the embargo sued the shipowner for breach of contract to carry.

The Court reluctantly allowed a recovery, on the ground that "a temporary interruption of a voyage by an embargo does not put an end to such a contract as this."

It is submitted that this case and *Spence* v. *Chodwick*, 10 Q. B. 517, also cited by the petitioner, *do not represent the present state of the English law as to frustration of charter parties.*

The Court is referred in this connection to the cases of *Lloyd Royal Belge* v. *Stathatos*, 33 T. L. R. 390, 34 T. L. R. 70, cited in the respondents' brief, and also to Scrutton on *Charter Parties and Bills of Lading*, eleventh Edition, pages 95 to 103, and the brochure of Mr. F. D. Mackinnon on "*The Effect of War on Contracts.*"

United States Supreme Court

October Term, 1950
No. 531

THE TEXAS COMPANY,
Petitioner
(Libelant-Appellant below),

against

HOGARTH SHIPPING CORPORATION, LTD. owner of The British Steamship BARON OGILVY, *et al.*,
Respondents
(Respondents-Appellees below).

MOTION BY RESPONDENTS TO ADVANCE.

JOHN M. WOOLSEY,
Counsel for Respondents.

UNITED STATES SUPREME COURT.

THE TEXAS COMPANY, Petitioner, (Libelant-Appellant Below), AGAINST HOGARTH SHIPPING CORPORATION, LTD., owner of the British Steamship *Baron Ogilvy, et al.*, Respondents, (Respondents-Appellees Below).	October Term, 1920. No. 555.

Sirs:

PLEASE TAKE NOTICE that on Monday, November 22nd, 1920, at the opening of Court on that day, or so soon thereafter as counsel can be heard, we shall make a motion on the annexed affidavit, before the Supreme Court of the United States, at the Captiol, Washington, D. C., that the above entitled case be advanced for hearing so that it can be argued at the same time as the case of Giuseppe Cavallaro, Petitioner, *vs.* Steamship *Carlo Poma*, her engines, etc.; Kingdom of Italy, Claimant, which is No. 167 on the Docket of the October, 1920, Term of the Supreme Court of the United States, and we shall

then and there also ask the Court to grant the petitioner such other or further relief in the premises as may be just.

Dated, November 16, 1920.

Yours, etc.,

JOHN M. WOOLSEY,
Counsel for Respondents.

To

MESSRS. HAIGHT, SANDFORD, SMITH AND GRIFFIN,
Proctors for Petitioner,
27 William Street,
New York City.

UNITED STATES SUPREME COURT.

THE TEXAS COMPANY,
Petitioner,
(Libelant-Appellant Below),

AGAINST

HOGARTH SHIPPING CORPORATION, LTD., owner of the British Steamship *Baron Ogilvy, et al.*,
Respondents,
(Respondents-Appellees Below).

October Term, 1920.
No. 555.

STATE OF NEW YORK, }
County of New York, } ss.:

JOHN M. WOOLSEY, being duly sworn, says:

1. I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, proctors appearing for respondents.

I am a member of the bar of the State of New York and of the bar of this Honorable Court.

2. This case is now in this Court on a *writ of certiorari* to the United States States Circuit Court of Appeals for the Second Circuit, which was granted on October 25, 1920, when the case was given the number of 555 on the Docket of this Court, October Term, 1920.

In ordinary course, I understand that a case with that number would not be reached for argument during the present Court year.

3. On November 15, 1920, application was made by counsel for the British Embassy in the above case for leave as *amicus curiae* to file a brief and take part in the oral argument in this Court.

I am informed that this Court granted leave to counsel for the British Embassy to intervene as *amicus curiae* and file a brief on behalf of the British Embassy, but reserved decision on the application for leave to take part in the oral argument.

4. The questions involved in the practice of submitting Ambassadorial certificates are of two kinds:

A. Where the Ambassadorial certificate claims immunity of a vessel from the Jurisdiction of any Court on the ground that it is in effect a public vessel.

B. Where the Ambassadorial certificate seeks, as it did in this case, to prove a Governmental fact or the Governmental nature of an act, the Governmental nature of which is challenged by the other party to the litigation.

5. There have been many recent cases in the lower Federal Courts in which both of these points have been taken.

Instances of decisions on the question of immunity are

The Carlo Poma, 259 Fed. 369, now on *certiorari* to this Court, being No. 167 on the October Term, 1920
The Maipo, 252 Fed. 627
The Roseric, 254 Fed. 154.

Instances of the proof of Governmental acts by Ambassadorial certificates are:

The Adriatic, 253 Fed. 489; 258 Fed. 902
The Athanasios, 228 Fed. 558
Earn Line S. S. Co. v. *Sutherland S. S. Co., Ltd.,* 254 Fed. 126; 264 Fed. 276.

The cases in which the Ambassadorial certificate has been offered as proof of Governmental acts but have not been dealt with by the Court are:

The Isle of Mull, 257 Fed 798
The Frankmere, 262 Fed. 819.

These two cases are now on appeal in the United States Circuit Court of Appeals for the Fourth Circuit, and it is expected that they will be argued in February, 1920, at the February, 1920, Term of that Court.

An instance where the Ambassadorial intervention was not permitted, although this does not appear in the opinion, was the case of *The Appalachee,* 266 Fed. 923, in the District of South Carolina.

6. Counsel for the respondents in this case has made a motion on this day in the case of *Luzzato & Son* v.

Steamship Pesaro, No. 317 of the October Term, 1920, that that case should be argued at the same time as *The Carlo Poma*, which is No. 167 on the October Term, 1920, Docket.

This motion is made in the present case in order that this case also may be argued at the same time as *The Pesaro*, if the Court grants the motion to advance it, and in any event at the same time as *The Carlo Poma*, which will be reached for argument in ordinary course, as deponent is informed, in the latter part of January, 1921.

7. The reason for this motion to advance this case is that if these three cases are argued together, all the questions of law and practice involved in Ambassadorial certificates will be before this Court and can be passed on definitely by this Court.

To have the decision of this Court on these questions is a matter of great practical importance for the reason that there are many cases other than those above mentioned in which the question of the introduction of an Ambassadorial suggestion or certificate by counsel representing the Ambassador as *amicus curiae* direct is involved and in which also the conclusiveness of such certificate, when admitted, is involved.

Your deponent has personal knowledge of a number of these cases and is concerned in several of them either directly or indirectly.

8. The questions involved in this case are so similar to the questions involved in *The Carlo Poma* and *The Pesaro*, and the questions involved have such gravity, novelty and importance that your deponent is of the

opinion that it would subserve the ends of justice to have the three cases argued together and have this Court definitely pass on the important questions of international law which are necessarily raised in them.

9. In addition to the question regarding the Ambassadorial certificate raised in this case, the case also involves the question whether the Court below properly held that a voyage charter party of a British vessel is frustrated by the requisition of the chartered vessel by the British Government in London, although the charter party was made in the United States; and generally, whether a British Governmental Executive act in fact dissolves a charter party obligation entered into in the United States if it wholly prevents performance of the charter party.

Other litigations are pending involving similar situations and questions which are obviously questions of broad interest and of fundamental importance and it is most desirable that these questions be authoritatively determined as soon as possible. The nature and scope of these questions more fully appear in the petition for certiorari and the opposition thereto filed herein on October 4, 1920, reference to which is hereby made.

10. Counsel for the British Embassy, who have received leave to appear as *amici curiae* herein, have examined and certified that in their opinion this motion is entitled to the favorable consideration of this Court.

Counsel for petitioner also joins in the application.

WHEREFORE it is submitted that it is appropriate that this case should be argued at the same time as *The Carlo Poma*, No. 167 of the October Term, 1920, and it is prayed that this Court may so order.

JOHN M. WOOLSEY.

Sworn to before me this
19th day of November, 1920
HARRISON LILLIBRIDGE,
Notary Public,
New York County. Clerks No. 393, Register No.
Commission expires March 30, 1921

We do hereby certify that we have examined and considered the foregoing motion and, in our opinion, it is well founded and entitled to the favorable consideration of this Court.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for the British Embassy,
Amici Curiae.

I join in the foregoing application that this case be advanced.

JOHN W. GRIFFIN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 555

THE TEXAS COMPANY,
Petitioner,

vs.

HOGARTH SHIPPING CORPORATION, LTD., Owner of the Steamship *Baron Ogilvy*, and HUGH HOGARTH & SONS.

Motion by Counsel for British Embassy for Leave to Intervene as Amici Curiae.

Now come Frederic R. Coudert, Esq., and Howard Thayer Kingsbury, Esq., counsel for the British Embassy in the United States of America, and move for leave to intervene in the above entitled cause as *amici curiae*, and as such *amici curiae* to file a brief and to be heard upon the argument of said cause, upon the following grounds:

1. Upon the hearing of this cause in the District Court of the United States for the Southern District of New York, the undersigned, upon application made at the trial, were permitted to intervene as *amici curiae* on behalf of the British

Embassy, and to present a Suggestion and Certificate avowing the requisition of the *Baron Ogilvy* as the act of the British Government.

2. Upon the hearing of this cause in the Circuit Court of Appeals for the Second Circuit, the undersigned, upon special application duly made therefor prior to such hearing, were permitted again to intervene as *amici curiae* on behalf of the British Embassy, to file a brief and to take part in the argument.

3. In the Courts below and upon the application for the writ of *certiorari* herein the petitioner sought to put in question the legal validity of the requisition of the *Baron Ogilvy* thus avowed by the British Government, and to impeach the verity of the Certificate of the British Embassy and of the Suggestion submitted on its behalf, and to object to the appearance by counsel for the British Embassy as *amici curiae*. It appears from the Brief submitted on behalf of petitioner upon the application for *certiorari* herein that all of the questions thus raised will be presented upon the argument of this cause upon the merits.

4. The practice of an appearance by leave of Court by counsel for a foreign Embassy as *amicus curiae* for the purpose of submitting a Suggestion or Certificate or presenting arguments in support of contentions in which the foreign Government is interested, has been repeatedly followed in this Court, in the Circuit Courts of Appeals for the Second, Third and Fifth Circuits, and in the District Courts for the Southern District of New York, the District of New Jersey, the Eastern District of Pennsylvania, the Eastern District of Virginia and the District of Florida,

and also in various State Courts and in the English Courts. The Certificates and Suggestions so presented or otherwise received in evidence have been taken as verity.

In only two instances known to the undersigned has such an application for leave to appear as *amicus curiae* on behalf of a foreign Embassy been refused. One was in the District of Maryland, in the case of *The Isle of Mull*, 257 Fed. 798, referred to in Petitioner's Brief in support of the application for *certiorari*, and the other was in the District of South Carolina, in *The Apalachee*, 266 Fed. 923. In neither of these cases is the subject mentioned in the opinion.

5. It is of great importance to the British Government that there should be an authoritative decision by this Court upon the propriety of the practice above set forth, and upon the conclusiveness of the Certificate of a foreign representative avowing a given act as the official action of the Government which he represents, and upon the lack of jurisdiction in the American Courts to enquire into the legal validity under the foreign law of governmental acts thus officially avowed; and it is earnestly desired that counsel for said Government, who have been heard in this cause in the Courts below, should have an opportunity to file a brief and be heard upon the argument in this Court also.

Dated November 15th, 1920.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy,
Amici Curiae,
No. 2 Rector Street,
New York City, N. Y.

IN THE

Supreme Court of the United States.

October Term, 1920
No. 555

THE TEXAS COMPANY,

Petitioner,

vs.

HOGARTH SHIPPING CORPORATION, LTD., Owner of the Steamship *BARON OGILVY*, and HUGH HOGARTH & SONS.

BRIEF FOR BRITISH EMBASSY.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for BRITISH EMBASSY,
Amici Curiae,
2 Rector Street,
New York City, N. Y.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920

No. 555

THE TEXAS COMPANY,
Petitioner,

vs.

HOGARTH SHIPPING CORPORATION, LTD., owner of the steamship *Baron Ogilvy*, and HOGARTH & SONS.

Brief of Counsel for British Embassy as Amici Curiae.

This brief is submitted by counsel for the British Embassy in the United States, as *amici curiae*, pursuant to leave granted by this Court on November 22nd, 1920, upon special application therefor made on November 15th, 1920. A similar intervention was permitted upon the trial in the District Court and again in the Circuit Court of Appeals. It was claimed by petitioner, upon the application for *certiorari* herein, that it was error to permit such intervention, to receive in evidence

the certificate of the British Embassy avowing the requisition of the *Baron Ogilvy* as a governmental act, and to decline to inquire into the legal validity of the requisition thus avowed.

The facts material to the questions thus raised are very simple and are not in dispute.

In February, 1915, the owners of the *Baron Ogilvy* chartered her to the Texas Company (the present petitioner) for a specified voyage to begin between April 15th and May 15th, 1915. On April 10, 1915, the vessel was requisitioned by the British Admiralty for government service and accordingly was not delivered to the charterer. The requisition was effected by a telegram from the office of the Director of Transports. The vessel remained under requisition until October 20th, 1915. Thereafter the Texas Company sued the owners of the vessel for damages for alleged breach of the charter party.

Upon the trial, counsel for the British Embassy presented a Certificate under the seal of the Embassy avowing the requisition as a governmental act, and a Suggestion to the same effect, and represented to the Court that it should not inquire into the fact, the validity or the effects of the requisition, or cast the owners of the vessel in damages for having obeyed the requisition. They were permitted to intervene as *amici curiae* for this purpose, and the Court received the Certificate and Suggestion (Rec., pp. 29-33, 38, 42-44).

The Court dismissed the libel, held that the taking and using of the vessel by the British Government rendered impossible the performance of the agreement embodied in the charter party, and declined to inquire into the validity of the requisition. The Court expressly refrained, however,

from resting this decision upon the conclusiveness of the Embassy Certificate, and referred to the fact that this question was before this Court in the case of *The Gleneden* (*Ex parte* Muir, Oct. Term 1918, No. 28), argued here January 7th, 1919, then and still undecided (Rec., p. 235).

Upon the appeal to the Circuit Court of Appeals substantially the same contentions were advanced by the Texas Company as upon its subsequent application to this Court for *certiorari*. The Circuit Court of Appeals affirmed the decree of the District Court without opinion (Rec. p. 253).

It appears from the application for *certiorari* that upon the hearing of this cause in this Court various questions are at issue between the parties which in no wise affect the interests of the British Government. These will not be discussed in this brief, which will be limited to the presentation of the following points.

Brief of the Argument.

1. The procedure followed in the Courts below in permitting intervention by counsel for the British Embassy as *amici curiae* was proper and in accordance with well established precedent.

2. The official avowal by the British Embassy, by its own Certificate, and the Suggestion of its counsel, conclusively establishes the fact of the requisition of the *Baron Ogilvy* and its governmental character and precludes further inquiry into the validity, legality or effect thereof.

3. The owners of the *Baron Ogilvy* should not be cast in damages for having obeyed the command of their Sovereign in time of war.

POINT I.

The procedure followed in the Courts below in permitting intervention by counsel for the British Embassy as amici curiae was proper and in accordance with well established precedent.

The inherent power of a Court to permit intervention by an *amicus curiae* and to receive information from him upon some matter of law in respect of which the Court is doubtful or some matter of fact of which the Court may take judicial notice when so informed, or to afford special opportunity for the presentation of some aspect of a controversy, is too well established to require extensive argument in this Court at this time. As this Court has said:—

> "It is within our discretion to allow it in any case when justified by the circumstances."

See Northern Securities Co. *vs.* United States, 191 U. S. 555,

citing prior instances in

> Green *vs.* Biddle, 8 Wheat. 1, 17
> Florida *vs.* Georgia, 17 Howard 478, 491
> The Gray Jacket, 5 Wall. 370.

Such permission may be and has been granted even after direct intervention as a party has been expressly denied.

> See The Employers Liability Cases, 207 U. S. 463, 490.

Recent instances in which counsel for the British Embassy have been permitted to intervene in this Court as *amici curiae* are

Dillon *vs.* Strathearn Steamship Co., 248 U. S. 182;
Strathearn Steamship Co. *vs.* Dillon, 251 U. S. 348;
Ex Parte Muir (*The Gleneden*) No. 28, Oct. Term, 1918, argued January 7, 1919, still awaiting decision.

The procedure of an appearance by counsel for a foreign consular or diplomatic representative as *amicus curiae*, for the purpose of laying before the Court by Suggestion or Certificate, or both, facts of an official nature, or presenting legal considerations pertinent to a pending controversy affecting the interests of the foreign government, has been frequently followed in the Federal Courts.

In the Circuit Court of Appeals the following recent instances may be cited:—

Second Circuit—
The Claveresk, 264 Fed. Rep. 276;
The Carlo Poma, 259 Fed. Rep. 369;
Muir *v.* Chatfield, 255 Fed. Rep. 24.
Third Circuit—
The Adriatic, 258 Fed. Rep. 902.
Fifth Circuit—
The Strathearn, 256 Fed. Rep. 631.

and in the District Courts:—

The Athanasios, 228 Fed. Rep. 558 (S. D. N. Y.);
The Strathearn, 239 Fed. Rep. 583 (N. D. Fla.);
The Maipo, 252 Fed. Rep. 627 (S. D. N. Y.);
The Adriatic, 253 Fed. Rep. 489 (E. D. Penna.);
The Roseric, 254 Fed. Rep. 154 (D. N. J.);
The Claveresk, 254 Fed. Rep. 127 (S. D. N. Y.);
The Santa Cruz, (not reported, E. D. Va., June 28, 1919).

The practice is also recognized in the State Courts and in the English Courts:

See

Nankivel *vs.* Omsk All Russian Government, New York Law Journal, Oct. 28, 1920;
Marine Transport Service Co. *vs.* Romanof, N. Y. Law Journal, February 1st, 1918;
The Constitution, L. R. 4 P. D. 39.

Although any private individual, or, as the District Court in the case at bar phrased it, "the first man that comes in off the street" (Rec. p. 32), may be permitted or invited to be heard as *amicus curiae*, the petitioner here contends that this privilege must be denied to a foreign diplomatic representative and that he may gain the ear of the Court only by applying to the State

Department to ask the Department of Justice to cause the desired representations to be made. That this Court has repeatedly permitted the direct intervention now attacked, and is permitting it in the case at bar, is a sufficient answer to this contention.

The other method is also perfectly proper, and is not infrequently followed, but it necessarily involves more circumlocution and delay, and no considered and reported case in any Court has been found in which it has been held to be exclusive.

In *The Luigi*, 230 Fed. Rep. 493, it appears that the District Court had indicated its preference that certain representations made to it "should come through official channels of the United States Government" and that such course was subsequently followed.

In *The Isle of Mull*, 257 Fed. Rep. 798, the District Court upon the trial, in the exercise of its discretion, declined to permit the intervention of an *amicus curiae*, but did not discuss the point in its opinion and proceeded upon the theory that the legal validity of the requisition there involved was immaterial, since there was no dispute that there had been actual interference with the vessel (See p. 802).

In *The Apalachee*, 266 Fed. Rep. 923, where the question was one of immunity, the Court declined to permit intervention, but held the case for some months to await the decision of this Court in *Ex Parte* Muir (*supra*). Meanwhile the vessel was released on bond, and eventually the case was decided on the merits without further consideration or discussion of the question of intervention.

It is recognized that where the Department of Justice intervenes on behalf of a foreign representative, it does so because it is the prerogative of the United States to subrogate itself a party in the place of the nation concerned.

See

The Pizarro, 19 Fed. Cas., No. 11,199.

Whatever limitations are imposed by custom and precedent upon a foreign representative in dealing with the Government to which he is accredited, formal communications to the Chief Executive or to the State Department do not constitute the whole extent of his functions. He may and does address the public at large and all manner of unofficial bodies and gatherings. He may cause suits to be instituted on behalf of his Government, and his authority to do so cannot be questioned.

See

Republic of Mexico *vs.* De Arangoiz, 5 Duer (N. Y.) 643, 646;
The Sapphire, 11 Wall. 164, 167.

He may instruct consular officers to intervene in various classes of litigation and such consular intervention is expressly provided for by many treaties.

See

Thompson vs. *Rocca*, 223 U. S. 317.

The Constitution recognizes his potential standing in judicial proceedings by its grant of original jurisdiction to this Court "in all cases affecting ambassadors, other public ministers, and con-

suls'' and its extension of the judicial power of the United States to such cases (U. S. Const. Art. III, Sec. 2).

It would be a strange and irrational limitation upon the privileges of a diplomatic representative to prescribe that when he has official knowledge of an official fact, material in a pending litigation, he may not inform the Court of it directly, but must cause the information to be transmitted through two Executive Departments of the United States Government before it may be allowed to reach its destination, and that although he may appear as a suitor, he may not be heard as a friend. No such disability is imposed upon him by law or custom.

In any event it does not lie in the mouth of a private litigant to make the objection, when the Court is willing to receive the information in this manner. There has been no remonstrance from the Executive branch and even if there were it would not be controlling upon the Court which, as vigorously pointed out by Judge Hough on the trial, sits ''as a representative of an independent and equally historical branch of the government of the United States'' and takes ''no orders from the Secretary of State, and no directions from him'' (Rec. p. 33). The petitioner, a private corporation of the State of Texas, has no standing thus to arrogate to itself the functions of a censor of the amenities of diplomatic procedure.

POINT II.

The official avowal by the British Embassy, by its own Certificate, and the Suggestion of its counsel, conclusively establishes the fact of the requisition of the Baron Ogilvy and its governmental character and precludes further enquiry into the validity, legality or effect thereof.

The evidentiary conclusiveness of an Ambassadorial certificate as proof of facts of an official character was recognized in the Courts of the United States in the early days of this Government.

See

United States *vs.* Peters, 3 Dall. 121 (1795).

Here the official character of a French public vessel was established by a certificate of the French Minister.

See also

The Exchange, 7 Cranch. 116;
Dupont *vs.* Pichon, 4 Dall. 321.

Recent instances in the Circuit Court of Appeals are:

Agency of Canadian Car & Foundry Co. *vs.* American Can Co. 258 Fed. Rep. 363; aff'g 253 Fed. Rep. 152;
The Carlo Poma, 259 Fed. Rep. 319;
The Claveresk, 264 Fed. Rep. 276.

Numerous cases in the District Courts have been cited under the preceding Point.

The same rule is applied in England.

See

The Parlement Belge, L. R. 5 P. D. 197, 219;
The Constitution, L. R. 4 P. D. 39;
The Crimdon, 35 Times Law Rep. 81;
In the Goods of Anne Dermoy, 3 Hagg. Eccl. 767;
In the Goods of Klingemann, 3 Swab. & Tr. 18;
In the Goods of Prince Oldenburg, L. R. 9 Prob. Div. 234.

In Tucker *vs.* Alexandroff, 183 U. S. 424, at p. 441, this Court, quoting with approval from Hall on International Law (§44), said:

> "Attestation by a Government that a ship belongs to it is final."

In the case at bar, there is a solemn attestation by the officially accredited representative of the British government that the *Baron Ogilvy* was requisitioned by it on a certain date and thereafter employed in its service until a certain later date. There is no attempt here to prove by official certificate facts of an unofficial character more properly provable by evidence *in pais*. Nor is the fact in question of such a "political" character as to require the affirmative recognition of the executive branch of the United States Government, as in the case of a change of sovereignty or of territorial boundaries. The question is: "Was the requisition of the *Baron Ogilvy* the act of the British Government". The British

Government by its diplomatic representative says "It was". There can be no more authoritative source of information or manner of proof of the administrative action of a foreign government within its own territory.

An official fact, when properly brought to the attention of the Court, becomes a subject of judicial notice. No one method of informing the Court is exclusive, and what method is proper or appropriate depends upon the nature of the fact and the circumstances of the case.

> See Talbot *vs.* Seeman, 1 Cranch, 1, at p. 38.

The requisition having been solemnly avowed by the British Government, its validity, legality and effect ceased to be proper subjects for contentious testimony or judicial inquiry in an American Court.

It is a commonplace of International Law as recognized by our Courts that:

> "The acts done under the authority of one "sovereign can never be subject to the revi- "sion of the tribunals of another sovereign,"
>
> (Per Story, J., in *The Invincible*, 2 Gall. 29)

This rule has been repeatedly and very recently reaffirmed.

See

> Underhill *v.* Hernandez, 168 U. S. 250;
> American Banana Co. *v.* United Fruit Co., 213 U. S. 347;
> Oetjen *v.* Central Leather Co., 246 U. S. 297;
> Ricaud *v.* American Metal Co., 246 U. S. 304.

The *Baron Ogilvy* was within the territorial jurisdiction of Great Britain when requisitioned and was thus subject, both in law and in fact, to the complete control of that Government. "Force is in reserve behind every State command" (See British &c Ins. Co. *vs.* Sanday, 32 Times Law Rep. 266), and the whole power of the British Empire was thus behind the telegram from the Director of Transports. Obedience to the command of the Sovereign was required by every consideration of patriotism, and opposition would have been as disloyal as resistance would have been futile. It was not incumbent upon the owners, and it is not appropriate for any foreign Court, to speculate concerning theoretical limitations upon the prerogative of the British Crown, or to inquire whether in this case the Crown misconceived its powers or exercised them irregularly or omitted some formality contemplated by the Proclamation of August 3, 1914.

If, as petitioner now contends, there was anything irregular or *ultra vires* in the original action of the Admiralty, it was cured by the ratification involved in the Government's subsequent avowal of it through the Embassy as an "Act of State."

See

O'Reilly de Camara *v.* Brooke, 209 U. S. 45, 52;

United States *v.* Heinzsen & Co., 206 U. S. 370, 385;

Buron *v.* Denman, 2 Exchequer, 166.

In the face of this ratification and of the rule that "the Courts of one independent government will not sit in judgment on the validity of the acts

of another done within its own territory" (Ricaud *vs.* American Metal Co., 246 U. S. at p. 309), it is of no avail to argue, as petitioner does, that the telegram from the Director of Transports was not equivalent to a warrant from the Secretary of the Lords Commissioner of the Admiralty or a Flag Officer of the Royal Navy. The power to requisition existed, and the act was done in British territory. That is sufficient for "this or any other American Court" (Oetjen *vs.* Central Leather Co., 246 U. S. at p. 304).

POINT III.

The owners of the Baron Ogilvy should not be cast in damages for having obeyed the command of their sovereign in time of war.

If there was any duty or obligation owed by the owners of the *Baron Ogilvy* to the petitioner, the performance of which was not prevented by the requisition, and which such owners have failed to perform, it is not for the representatives of the British Government to advance any arguments on the subject. Whether the requisition did or did not work a complete "frustration" of the commercial adventure contemplated by the parties, and render performance of the charter party "impossible" in the legal sense, is an issue with which the British Government is not concerned, provided that the fact and the validity of its requisition are not brought into question.

It is, however, appropriate for the British Government to urge that its subjects should not be

mulcted in damages for having obeyed its orders and yielded the *Baron Ogilvy* to its requisition, when the fate of civilization was hanging in the balance, the submarine was harrying the merchant fleet, and England was rallying her volunteers, from home counties and Dominions overseas, to strengthen the ranks of her hard pressed forces by the Yser and the Aisne.

No contractual relations with private parties could place upon the British owners of this British vessel a higher obligation in law or in ethics than their duties of loyalty and allegience to their Sovereign and obedience to his commands.

Conclusion.

So far as the review sought by petitioner attacks the intervention on behalf of the British Embassy, or the effect of the Suggestion and Certificate, or puts in question the fact or the validity of the requisition of the *Baron Ogilvy,* or asks damages against her owners by reason of their obedience to such requisition, the decree should be affirmed.

Respectfully submitted this 10th day of January, 1921.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for British Embassy,
Amici Curiae,
No. 2 Rector Street,
New York City, N. Y.